United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1929

No. 5024

727

SPECIAL CALENDAR

MACFADDEN PUBLICATIONS, INC., APPELLANT,

vs.

FEDERAL TRADE COMMISSION, EDGAR A. McCULLOCH, GARLAND S. FERGUSON, JR., ET AL., COMMISSIONERS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 31, 1929.

PRINTED SEPTEMBER 27, 1929.

Court of Appeals of the District of Columbia

APRIL TERM, 1929

No. 5024

SPECIAL CALENDAR

MACFADDEN PUBLICATIONS, INC., APPELLANT,

vs.

FEDERAL TRADE COMMISSION, EDGAR A. McCULLOCH, GARLAND S. FERGUSON, JR., C. W. HUNT, WILLIAM E. HUMPHREY, AND CHARLES S. MARCH, COMMISSIONERS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	*a*	1
Petition for writ of mandamus	1	2
Exhibit A	8	7
B	13	10
C	15	12
D	20	15
Order	21	16
Alternative writ of mandamus	22	17
Respondents' answer and return	25	19
Exhibit "A"	41	31
"B"	43	33
"C"	45	34
"D"	46	35
"E"	47	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1929.

	Original	Print
Exhibit "F"—Exhibit "A"	49	37
"G"	50	38
"H"	52	39
"I"	54	41
"J"	58	44
"K"	60	45
"L"	63	47
"M"	65	48
Demurrer to answer	67	50
Demurrer overruled; rule to show cause discharged; petition denied; exception prayed and allowed; appeal noted; bond fixed	68	50
Memorandum: Undertaking on appeal for $100.00 approved and filed	68	51
Assignment of errors	69	51
Designation of record	70	52
Clerk's certificate	71	52

Court of Appeals of the District of Columbia

No. 5024.

MACFADDEN PUBLICATIONS, INC., Appellant,

vs.

FEDERAL TRADE COMMISSION, EDGAR A. MCCULLOCH et al.,
Commissioners.

a Supreme Court of the District of Columbia.

At Law.

No. 76601.

MACFADDEN PUBLICATIONS, INC.,

vs.

FEDERAL TRADE COMMISSION and EDGAR A. MCCULLOCH, Garland S. Gerguson, Jr., C. W. Hunt, William E. Humphrey, and Charles S. March, Commissioners.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Supreme Court of the District of Columbia.

At Law.

No. 76601.

MACFADDEN PUBLICATIONS, INC.,

versus

FEDERAL TRADE COMMISSION and EDGAR A. MCCULLOCH, Garland S. Ferguson, Jr., C. W. Hunt, William E. Humphrey, and Charles S. March, Commissioners.

Petition for Writ of Mandamus.

Filed Apr. 30, 1929.

To the honorable the judge of the said court:

(1) The petition of Macfadden Publications, Inc. respectfully shows that it is a corporation organized and existing under and by virtue of the laws of the State of New York.

(2) That petitioner owns and controls the stocks of various corporations which are engaged in the publishing of various periodicals in the United States and in foreign countries, which said periodicals are distributed by it and under its name.

(3) That heretofore and on the 24th day of November, 1928, a proceeding was instituted against it pursuant to the provision of an act of Congress approved September 26th, 1914 entitled "An Act to Create a Federal Trade Commission, to define its powers and duties and for other purposes" wherein the said petitioner as respondent was ordered to show cause why a decree should not be made against it requiring it to cease and desist from certain practices therein alleged, which said practices were alleged to be to the prejudice of the public and respondent's competitors and constituted unfair methods of competition in interstate commerce within the intended meaning of Sec-
2 tion 5 of the Act of Congress heretofore referred to.

A copy of said complaint is annexed hereto and marked Exhibit "A."

(4) Respondent therein duly appeared in such proceeding by its attorney and filed an answer, a copy of which is annexed hereto and marked Exhibit "B."

(5) That thereafter and on the 26th and 28th days of February and on the 1st day of March, 1929 such proceeding came on for hearing before one Edward M. Averill, an Examiner of such Commission, pursuant to notice duly served upon petitioner herein, the respondent therein, and various testimony alleged to be in support of the complaint was adduced and taken.

(6) That at such hearing and on the 1st day of March, 1929 the said Federal Trade Commission concluded its affirmative case and an adjournment was thereupon taken at the request of petitioner to permit it to make formal application for the issuance of subpœnas and subpœnas duces tecum to various witnesses and persons required by the petitioner and whose testimony your petitioner desired to offer in support of the allegations contained in its answer heretofore filed and referred to.

(7) Thereafter and on the 4th day of March, 1929 petitioner made formal application for the issuance of subpœnas duces tecum for certain persons named in such application and for the issuance of subpœnas to certain other persons therein named, which said subpœnas duces tecum and subpœnas were thereafter issued by the Commission requiring the appearance of the persons therein named and the production of the documents therein described.

(8) Thereafter and on the 27th day of March, 1929 petitioner's counsel received a notice from such Commission that certain of such witnesses had made application to it to vacate and set aside the subpœnas duces tecum theretofore 3 served upon them and that such applications had been granted insofar as the same sought to vacate and set aside the portion of such subpœnas requiring the production of certain documents and papers.

(9) Thereafter and on the 4th day of April, 1929 petitioner through its counsel made application for the issuance of subpœnas duces tecum and subpœnas to certain persons named in such notice, a copy of which said notice is annexed hereto and marked Exhibit "C" hereof.

(10) Thereafter and on or about the 22nd day of April, 1929 petitioner through its counsel was advised that such Federal Trade Commission had denied its said application.

(11) That the Federal Trade Commission is a body organized and existing by virtue of the Federal Trade Commission Act empowered, among other things and particularly by Section 5 of such Act, to prevent persons, partnerships or corporations from using unfair methods of competition in commerce. By such Section 5 of such Act such Commission is authorized to require such person, partnership or corporation using any unfair method of competition in commerce when it appears that such a proceeding would be in the interest of the public, to show cause why an order should not be entered by the Commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in such complaint. By such Section 5 of said Act it is provided that "The person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered."

(12) That the said Federal Trade Commission has duly
made certain rules and regulations called "Rules of
4 Practice before the Commission" among which said
rules and regulations and particularly pursuant to
Rule 7, it is provided as follows:

> "Subpœnas for the production of documentary evidence (unless directed to issue by a Commissioner upon his own motion) will issue only upon application in writing which must be verified and must specify as near as may be the documents desired and the facts to be proved by them."

(13) That petitioner made such formal verified application in writing, specifying the names of the witnesses to be subpœnaed and the documents to be produced and the facts and evidence which it intends to prove by such witnesses and documents and has asked for the opportunity and right, as given by such Act, to appear and show cause why an order should not be entered by the Commission requiring it to cease and desist from the practices complained of.

(14) The petitioner intends to prove that the proceeding hereinbefore described is not to the public interest and that it is not engaged in any practices tending toward a monopoly but on the contrary that the methods used by it are common trade practices and have been adopted and used

by almost all of its competitors and that it would be unfair competition against the respondent therein, the petitioner herein, if it were ordered to cease and desist therefrom.

(15) Your petitioner is informed and verily believes that such testimony is material, necessary, relevant and competent and that it is essential to it in its defense to prove by its competitors and by the documentary evidence, the production of which is sought, that such competitors are using and have been using similar or identical methods in the conduct of their business; that such methods have long been recognized as fair, proper and honorable; that no persons have been misled or deceived thereby and that no competitors have complained nor could complain of your petitioner's conduct.

(16) Petitioner is advised that from such order refusing to issue such subpœnas it has no present right of appeal and that there is no other adequate remedy to enforce obedience to such subpœnas or to enforce or compel the production of the documents required. Petitioner is advised and verily believes that the conduct of such Federal Trade Commission in denying its application for the issuance of such subpœnas duces tecum is acting without warrant or right and that the same amounts to an invasion of the respondent's constitutional privileges and that the same prevents it from duly and properly showing cause why an order should not be entered against it requiring it to cease and desist from certain practices, which right is specifically granted to your petitioner pursuant to Section 5 of the Federal Trade Commission Act.

(17) Petitioner is informed and believes that the Federal Trade Commission is about to serve notice upon it of a time and place of hearing at which said time and place your petitioner will be required to present evidence in support of the answer heretofore filed by it and in answer to the charges contained in the complaint and that unless evidence is adduced by your petitioner in its defense at such hearing an order may be entered against it, requiring it to cease and desist from the practices complained of in the complaint heretofore issued, and that unless such Commission is ordered to issue such subpœnas and subpœnas duces tecum to the witnesses required by and to be called by your

petitioner, it will be unable to adequately, properly
6 or duly defend the proceeding so pending and that it will be deprived of its property or rights without due process of law.

(18) Your petitioner alleges that it is entirely without remedy in the premises unless an order be granted for the issuance of an alternative writ of mandamus commanding and directing the Federal Trade Commission to forthwith issue subpœnas and subpœnas duces tecum as demanded in such notice dated April 2nd, 1929, a copy of which is annexed hereto marked Exhibit "C" hereof as though herein below set forth, or to appear before the court on some day to be named in said writ and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring such Federal Trade Commission to issue such subpœnas and subpœnas duces tecum to such persons in such notice and for such other and further order to be had in the premises as Justice may require.

This is the first application for writ of mandamus in this cause.

HARRY L. RABBITT,
HARRY T. LORE,
J. H. SYKES,
Attorneys for Petitioner.

JOSEPH SCHULTZ,
522 Fifth Avenue, New York, N. Y.,
Of Counsel.

7 District of Columbia, *ss:*

Wesley F. Pape, being duly sworn, deposes and says: That he is the Secretary of Macfadden Publications, Inc., the petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

WESLEY F. PAPE.

Sworn to before me this 30 day of April, 1929.

[Seal of Richard J. Quigley, Notary Public, District of Columbia.]

R. J. QUIGLEY,
Notary Public, D. C.

8 EXHIBIT A.

Filed Apr. 30, 1929.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Complaint.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission charges that Macfadden Publications, Inc., a corporation, hereinafter referred to as respondent, has been, and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One. Respondent, Macfadden Publications, Inc., is a corporation organized and existing under the laws of the State of New York with its principal office and place of business in the City of New York, State of New York. Respondent is a holding company, owning and controlling the stock of other corporations engaged in publishing various magazines, periodicals and tabloid dailies, and respondent conducts, manages, controls and directs the corporations whose stock it owns and controls, and acts as the distributing agent for such publications, managing, controlling and directing the subscription, circulation
9 and advertising activities for such publications. In the course and conduct of such business respondent sells said magazines, periodicals and tabloids to purchasers located in various States of the United States and causes said magazines, periodicals and tabloid newspapers to be shipped from their respective places of publication through and into other States of the United States to the purchasers thereof; and it solicits sales of, and subscriptions to said

magazines, periodicals and tabloid dailies by means of circulars and letters which it causes to be sent from its place of business through and into other States of the United States to prospective purchasers or subscribers. In the course and conduct of its aforesaid business it is in competition with other corporations, individuals and partnerships.

Paragraph Two. In the course and conduct of its aforesaid business respondent causes circulars and letters to be sent to prospective purchasers or subscribers for such magazines, periodicals and dailies, located in various States of the United States, stating that the usual, ordinary, regular and full price of such subscription or purchase is a certain sum set out and specified in said circulars and letters, and also stating that said respondent for a certain limited time therein specified is offering to sell and deliver such publication or publications to the particular party to whom the circular or letter is sent at a reduced and special price, which is a substantially smaller price than that set out as the ordinary, regular and usual price for such subscription. Such representations made by respondent
10 are false and misleading, for the pretended reduced or special price is the usual, ordinary, regular and full price for the subscription which the respondent is soliciting. Respondent further represents in said circulars and letters that such special and reduced price is made to only a few specially selected prospective customers, whereas in truth and in fact the price is the regular, full and usual price to everyone for the subscription. The use by respondent of said false and misleading statements and representations is calculated to and has the tendency and capacity to mislead and deceive the public, and does mislead and deceive the public into subscribing to or buying said magazines, periodicals and/or dailies in the belief that it is obtaining said magazines, periodicals and/or dailies at a reduced and special price.

Paragraph Three. The above alleged acts and practices of respondent are each and all of them to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in interstate commerce within the intent and meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act

To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Wherefore, the premises considered, the Federal Trade Commission on this 24th day of November A. D., 1928, now here issues this its complaint against said respondent.

11 *Notice.*

Notice is hereby given you, Macfadden Publications, Inc., respondent herein that the 8th day of January, A. D., 1929 at 10:30 o'clock in the forenoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of law charged in this complaint.

You are notified and required within thirty days from service of the complaint, unless such time be extended by order of the Commission, to file with the Commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of Practice adopted by the Commission with respect to answer and failure to answer (Rule III) provide as follows:

(1) In case respondents should desire to protest the proceeding such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondents shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondents are without knowledge, in which case respondents shall so state, such statement operating as a denial. Any
12 allegation of the complaint not specifically denied in the answer, unless respondents shall state in the answer that respondents are without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondents desire to waive hearing on the charges set forth in the complaint and not to contest the

proceeding, the answer may consist of a statement that respondents refrain from contesting the proceeding or that respondents consent that the Commission may make, enter and serve upon respondents an order to cease and desist from the violation of the law alleged in the complaint, or that respondents admit all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondents to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In witness whereof the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 24th day of November, A. D., 1928.

By the Commission:

[SEAL.] OTIS B. JOHNSON,
Secretary.

13 EXHIBIT B.

Filed Apr. 30, 1929.

UNITED STATES OF AMERICA:

Before the Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Macfadden Publications, Inc., respondent, by Joseph Schultz, its attorney, for its answer to the complaint herein alleges as follows:

First. Denies each and every allegation contained in paragraphs Two and Three of the plaintiff's complaint.

For a first separate and distinct defense to the complaint it alleges as follows:

Second. Repeats and realleges each and every allegation contained in paragraph "First" hereof, with the same force and effect as if the same were set forth at length herein.

Third. Respondent further alleges that the literature, circulars and letters used by it in the solicitation of subscriptions and sales of the magazines and periodicals published and distributed by it truthfully warrant and represent that the price of such subscriptions so sought to be sold, or such sale so sought to be made by subscription, is at a price which is less than the newsstand or ordinary sales price of such magazine or periodical so advertised and fairly and truthfully warrant and represent that a
14 certain specific sum as named in such printed matter, circular or letter will be saved to such subscriber availing himself of such offer, which said saving in price is the actual difference between the newsstand or ordinary sales price of such magazine or periodical and the price so stated as the subscription price in such circular, letter or printed matter.

Fourth. That all such literature, circulars, printed matter and letters and the offers contained therein are first submitted to the United States Post Office authorities for their approval and that all of the matter so contained in such circulars, printed matter, letters or offers so circularized by the respondent is first approved by such Department.

Fifth. That the literature, circulars, printed matter and letters so circularized by the respondent conform to and are similar to literature, circulars, printed matter and letters circularized and used by other corporations, partnerships and individuals engaged in the printing, publishing and distribution of magazines, periodicals and newspapers and is and has been commonly recognized as the proper, ordinary practice in such trade.

Sixth. That the conduct of the respondent does not constitute unfair competition and is not in violation of Section 5 of an Act of Congress approved September 26th, 1914 entitled "An Act to Create a Federal Trade Commission, to define its powers and duties and for other purposes."

Wherefore respondent prays that the complaint be dismissed.

JOSEPH SCHULTZ,
Attorney for Respondent.

15 EXHIBIT C.

Filed Apr. 30, 1929.

UNITED STATES OF AMERICA:

Before the Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

SIRS:

The Respondent having heretofore and on the 4th day of March, 1929 made formal application pursuant to Rule 7 of the rules of practice of the Federal Trade Commission for the issuance of subpœnas to certain persons, firms and corporations therein described and for the issuance of subpœnas duces tecum therein described and

The Federal Trade Commission having thereafter issued such subpœnas to such persons, firms and corporations as therein requested, and,

The Federal Trade Commission having thereafter and on the 27th day of March, 1929 on the petition of some of such witnesses so subpœnaed vacated the duces tecum clause requiring the production of the papers and documents therein described from the subpœnas issued to and served upon the following:

McCall's Magazine by Lowell Shumway,
International Magazine Company by T. J. Buttikofer,
Crowell Publishing Company by Robert Messler and Thomas Stewart,
Doubleday, Doran & Co. by Charles K. Roe,
Franklin Square Agency, by F. M. Singsen.

16 and having vacated such duces tecum clause without notice to the Respondent and without ascribing cause therefor and

Such action on the part of the Commission having been contrary to law and without jurisdiction

Now, therefore, please take notice that the Respondent requests that subpœnas be issued for the 8th day of April, 1929 at ten o'clock in the forenoon of that day or as soon thereafter as the Commission may designate at the office of the Federal Trade Commission or at any other place designated by the Federal Trade Commission in the City of New York on its behalf for the following witnesses:

McCall's Magazine by Lowell Shumway, 236 West 37th Street, New York City.

Crowell Publishing Company by Robert Messler, 250 Park Avenue, New York City .

Crowell Publishing Company by Thomas Stewart, 250 Park Avenue, New York City.

Doubleday, Doran & Co. by Charles K. Roe, Garden City, Long Island, N. Y.

The Review of Reviews by F. N. Stone, 55 Fifth Avenue, New York City.

Butterick Publishing Co. by Ronald H. Bachman, Spring & MacDougall Sts., New York City.

International Magazine Co. by T. J. Buttikofer, Eighth Ave. & 57th St., New York City.

Conde Nast Publications by Thomas Kernan, 420 Lexington Ave., New York City.

and that each of such witnesses be required to produce any and all copies of letters, circulars and literature used by each of such persons, firms or corporation so subpœnaed in the solicitation of subscriptions to the magazines or periodicals published or distributed by each of such persons, firms or corporations, used during the years 1924 to date, showing particularly that such letters, circulars and 17 literature contain offers to prospective subscribers, which said offer was being made to a special or limited group for a limited period and/or alleging that the price offered in such letter, circular and literature for such subscription is less than the regular, usual and ordinary price of such subscription, together with any and all copies of reports containing circulation figures made semiannually by each of such persons, firms or corporations to the Audit Bureau of Circulation during the years hereinbefore specified.

Respondent intends to prove by such testimony and such documents that

(*a*) Competitors engaged in the publishing business solicit subscriptions to their publications by similarly representing, as does the Respondent, that the price of the subscription so offered in such literature is less than the usual, ordinary and regular price of such subscription;

(*b*) That such offer is represented as being made to a limited or special group;

(*c*) That such offer is made for a limited time only;

(d) That for a long time responsible persons, firms and corporations, similarly engaged in the business in which Respondent is engaged, have commonly understood the practices used by the Respondent in the solicitation of subscription circulation as ethical, fair and proper and that such practices have never heretofore been regarded as opposed to good morals;

(*e*) That the methods complained of do not constitute unfair competition nor is there a public interest in stopping the practices nor is a substantial portion of the public deceived thereby.

Respondent contends that the testimony so sought to be adduced is material, competent and relevant and has been so held to be material and relevant in

18 Federal Trade Com. v. Anderson, Gratz et al., 253 U. S. 421;

L. B. Silver Co. v. Federal Trade Com. 289 Fed. 985.

John C. Winston Co. v. Federal Trade Com., 3 Fed. (2d) 961.

Winsted Hosiery Co. v. Federal Trade Com., 272 Fed. 957; 258 U. S. 483;

Ostermoor & Co. v. Federal Trade Com., 16 Fed. (2d) 962.

Chicago Portrait Co. v. Federal Trade Com., 4 Fed. (2d) 759; 266 U. S. 42;

Federal Trade Com. v. Beechnut Packing Co., 42 Sup. Ct. Rep. 150.

Respondent further requests that a subpœna duces tecum be issued to Franklin Square Agency by F. M. Singsen, 49 East 33rd Street, New York City, requiring such person, firm or corporation to produce any and all circulars, literature or catalogues published or distributed by such person, firm or corporation during the years 1924 to date in which offers are contained and prices are given for a subscription for one, two and more years to any of the publications published by the Respondent.

Respondent intends to prove by such testimony and such documents that the prices quoted by the Respondent in the solicitation of subscriptions were the regular, usual and ordinary prices and that subscriptions to its various publications were being obtained and solicited at such regular prices during the time that such special offers were made by the Respondent.

Respondent further requires that should such witnesses so to be subpœnaed move to vacate such subpœnas or refuse to comply therewith, that pursuant to Section 9 of the Federal Trade Commission Act, proceedings be instituted by the Commission in the name of the Federal Trade
19 Commission as authorized in such section of such Act.

Dated New York April 2, 1929.

Yours, &c.,

JOSEPH SCHULTZ,
Attorney for Respondent.

Office & P. O. Address: 522 Fifth Avenue, Borough of Manhattan, City of New York.

20 EXHIBIT D.

Filed Apr. 30, 1929.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office, in the City of Washington, D. C., on the 20th day of April, A. D., 1929.

Commissioners: Edgar A. McCulloch, Chairman; Garland S. Ferguson, Jr., C. W. Hunt, William E. Humphrey, Charles H. March.

Docket No. 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Order.

An application for subpœnas duces tecum having been filed by counsel for the respondent on April 4, 1929, and having been considered by the Commission, It is ordered that said application be, and the same is hereby, denied.

By the Commission.

OTIS B. JOHNSON,
Secretary.

* * * * * * *

21 *Order.*

Filed Apr. 30, 1929.

On reading and filing the sworn petition of Macfadden Publications, Inc., petitioner herein, and upon due consideration thereof and on motion of Harry T. Lore, counsel to the said petitioner,

It is ordered that a writ of mandamus forthwith issue out of this Court directed to Edgar C. McCullogh, Garland S. Ferguson, Jr., C. W. Hunt, William E. Humphrey and Charles H. March, Commissioners of the Federal Trade Commission directing and commanding the said Federal Trade Commission forthwith to issue subpœnas and subpœnas duces tecum to certain persons pursuant to the demand theretofore duly made by the petitioner unless the said parties hereinbefore named or any of them shall on the 10th day of May, A. D. 1929 at 10 A. M. before this Honorable Court at the Court House, Supreme Court, Washington, District of Columbia, show good cause to the contrary herein.

Further ordered that the writ so issued be served forthwith on all of the above named parties.

WENDELL P. STAFFORD,
Justice.

22 Service of a copy of this writ made on the Federal Trade Commission on this the 2nd day of May, 1929, and all other service is waived by the Commission.

ROBT. E. HEALY,
Chief Counsel, Federal Trade Commission.

A copy of this writ was served on the Federal Trade Commission on this the 2nd day of May, 1929, by serving the same on me as Chairman of said Commission,

E. A. McCULLOCH,
Chairman.

* * * * * * *

Alternative Writ of Mandamus.

Issued April 30, 1929.

To Edgar A. McCulloch, Garland S. Ferguson, Jr., C. W. Hunt, William E. Humphrey, and Charles H. March, Commissioners of the Federal Trade Commission, and each of them and the successors in the office of each of them:

Whereas a complaint was heretofore issued to Macfadden Publications, Inc., by the Federal Trade Commission giving it notice to appear at a time and place therein stated to show cause why an order should not be entered by said Commission requiring it to cease and desist from the violation of law charged in such complaint; and

Whereas the said Macfadden Publications, Inc., thereafter duly filed its answer to such complaint, denying the violations of law therein charged; and

Whereas the said Macfadden Publications, Inc., has required and requested the said Commission pursuant to its rules to issue subpœnas and subpœnas duces tecum upon various persons, firms or corporations requiring them and each of them to produce certain records and documents; and

23 Whereas under the Rules of such Commission it became the duty of such Commission to issue such subpœnas and subpœnas duces tecum; and

Whereas it has failed, neglected and refused to perform such duty and to issue the same, all of which will more fully appear by the petition of the said Macfadden Publications, Inc.,

Now, therefore, you the said Edgar S. McCulloch, Garland S. Ferguson, Jr., C. W. Hunt, William E. Humphrey, and Charles S. March, Commissioners of the Federal Trade Commission, and each of you and your respective successors in office are hereby commanded and enjoined that immediately upon the receipt of this writ and unless you shall, on the 10th day of May, A. D. 1929 next before this Honorable Court at the hour of 10 A. M. at the Court House in Washington, District of Columbia, show good cause to the contrary, proceed forthwith and perform your several duties as prescribed in the Federal Trade Commission Act, to wit, that you do forthwith issue subpœnas and subpœnas duces tecum for a time and place which shall be the time and place of the next hearing in the proceeding pending against Macfadden Publications, Inc., before the Federal Trade Commission to the following witnesses:

McCall's Magazine by Lowell Shumway, 236 37th St., New York City.

Crowell Publishing Company by Robert Messler, 250 Park Avenue, New York City.

Crowell Publishing Company by Thomas Stewart, 250 Park Avenue, New York City.

Doubleday, Doran & Co. by Charles K. Roe, Garden City, Long Island, New York.

The Review of Reviews by F. N. Stone, 55 Fifth Avenue, New York City.

Butterick Publishing Co. by Ronald H. Bachman, Spring & MacDougall Streets, New York City.

24 International Magazine Co. by T. J. Buttikofer, Eighth Ave., and 57th Street, New York City.

Conde Nast Publications by Thomas Kernan, 420 Lexington Avenue, New York City.

and that each of such witnesses be required to produce any and all copies of letters, circulars and literature used by each of such persons, firms or corporations so subpœnaed in the solicitation of subscriptions to the magazines or periodicals published or distributed by each of such persons, firms or corporations, used during the years 1924 to date, showing particularly that such letters, circulars and literature contain offers to prospective subscribers, which said offer was being made to a special or limited group for a limited period and/or alleging that the price offered in such letter, circular and literature for such subscription is less than the regular, usual and ordinary price of such subscription, together with any and all copies of reports containing circulation figures made semi-annually by each of such persons, firms or corporations to the Audit Bureau of Circulation during the years hereinbefore specified; also to Franklin Square Agency by F. M. Singsen, 49 East 33rd Street, New York City, requiring such person, firm or corporation to produce any and all circulars, literature or catalogs published or distributed by such person, firm or corporation during the years 1924 to date in which offers are contained and prices given for a subscription for one, two and more years to any of the publications published by the Macfadden Publications, Inc.

Dated Washington, D. C., April 30, 1929.

Witness the Honorable Walter I. McCoy, Chief Justice of said court, this 30 day of April, 1929.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,
By ALF. G. BUHRMAN,
Asst. Clk.

* * * * * * *

25 *Respondents' Answer and Return.*

Filed May 9, 1929.

To the Honorable the Justices of the Supreme Court of the District of Columbia:

Now comes the above-named respondents and, in answer to the petitioner's petition filed in this cause as well as by way of return to the rule to show cause herein issued, say:

(1) They admit the averments of Paragraph (1).
(2) They admit the averments of Paragraph (2).
(3) They admit the averments of Paragraph (3).
(4) They admit the averments of Paragraph (4).
(5) They admit the averments of Paragraph (5).

(6) Answering the averments of Paragraph (6), they admit that at the close of the hearings on the first day of March, 1929, and at the request of the petitioner, an adjournment was taken in order to permit petitioner to make formal application for the issuance of subpœnas and subpœnas duces tecum to various persons; but deny that 26 the papers and documents for which petitioner requested subpœnas duces tecum, or any of them, would tend in any way to disprove or explain the charges made against petitioner in the complaint of the Federal Trade Commission, or were in any way relevant or material to that proceeding.

(7) They admit the averments of Paragraph (7), and further aver that said subpœnas duces tecum were issued upon the basis of representations by petitioner's attorney that there was no objection upon the part of those to whom said subpœnas duces tecum were issued to the production of the documents called for by such subpœnas, that he had seen the parties and that such documents would be willingly produced. It had been pointed out to petitioner's counsel that the subpœnas duces tecum requested by the application of March 4, 1929, would amount to unreasonable search and seizure, in violation of the Fourth Amendment to the Constitution of the United States; that the documents which apparently would be required by such subpœnas duces tecum seemed to be irrelevant and immaterial under the charges of the complaint; that such subpœnas duces tecum would be unenforceable, and the Commission would not issue subpœnas duces tecum which it did not believe could be enforced. A copy of the application of March 4, 1929 is attached hereto and marked Exhibit "A", and by reference thereto made a part of this answer and return. Copies of the correspondence between the Chief Counsel of the Commission and the attorney for petitioner referring to some of the above representations are attached hereto and marked Exhibits "B", "C", "D" and "E" and by reference thereto made a part of this answer and return.
A copy of one of said subpœnas duces tecum is attached
hereto and marked Exhibit "F", and by reference
27 thereto made a part of this answer and return. All
of said subpœnas duces tecum are similar to this
one.

(8) They admit the averments of Paragraph (8) and further aver that upon receiving from the parties upon whom subpœnas duces tecum had been served in accordance with the application of respondent of March 4, 1929 and the representations of petitioner's attorney above set forth, motions to vacate said subpœnas duces tecum, copies of which motions are attached hereto and marked Exhibits "G", "H", "I", "J", "K", "L" and "M", and by reference thereto made a part of this answer and return, and learning therefrom that said parties objected to the production of the documents called for in said subpœnas duces tecum, and believing that said subpœnas duces tecum were

unenforceable, they vacated the duces tecum clause of said subpœnas duces tecum.

(9) Answering the averments of Paragraph (9), they admit that thereafter, and on April 4, 1929, petitioner through its counsel made another application for subpœnas duces tecum to the same parties to whom it requested such subpœnas in its application of March 4, 1929, and that Exhibit "C" attached to the petition herein is an accurate copy of said application.

(10) They admit the averments of Paragraph (10) in so far as they relate to subpœnas duces tecum, but deny that the Federal Trade Commission has refused to issue upon application of petitioner subpœnas ad testificandum and aver that all such subpœnas requested by petitioner have been issued and served, and that such subpœnas have been issued and served upon those to whom subpœnas duces tecum were denied.

28 (11) Answering the averments of Paragraph (11), they say that the provisions of Section 5 of the Federal Trade Commission Act, to which reference is there made, are as follows:

> "Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.
>
> "The Commission is hereby empowered and directed to prevent persons, partnerships or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> "Whenever the commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. * * *"

(12) They admit the averments of Paragraph (12).

(13) Answering the averments of Paragraph (13), they admit that petitioner made formal verified application in writing, as shown by Exhibit "C" attached to the petition, but they deny that petitioner has not been afforded the opportunity and right, as given by said Act, to appear and show cause why an order should not be entered by the Commission requiring it to cease and desist from the practices complained of. They aver that a time and place for such appearance on the part of the petitioner has been repeatedly set, and each time has been postponed at the request of the petitioner.

29 (14) Answering the averments of Paragraph (14), they are without knowledge of what petitioner intends to prove in the proceeding before the Commission, but aver that it has not been shown that the documents for which subpœnas duces tecum were requested would tend in any way to establish what petitioner states in said paragraph it intends to prove, and further aver that such documents would not in any way tend to prove what petitioner so states it intends to prove in said proceeding, and further aver that the practices of petitioner's competitors are not relevant or material in the proceeding before the Commission.

(15) Answering the averments of Paragraph (15), respondents deny that the documents for which petitioner requests subpœnas duces tecum are material or relevant to the proceeding before the Commission, or that they are necessary to prove, if such be relevant and material, that some competitors are using similar or identical methods to those charged against petitioner, and aver further that there is nothing in the record which tends to show that such documents, if produced, would in any way tend to prove that such competitors of petitioner are using, or have been using, similar or identical methods in the conduct of their businesses. The application of petitioner seemingly calls for subpœnas duces tecum to certain of its competitors for any and all copies of letters, circulars and literature used by them in the solicitation of subscriptions, showing particularly that such letters, circulars and literature contain offers of subscriptions to a special or limited group for a limited period and/or at a price said to be less than the regular, usual and ordinary price of such sub-

scriptions, regardless of whether such statements in such letters, circulars and literature are true, or are, as it is charged are such representations of petitioner, false.
30 They further aver that the use of such methods by such competitors, if a fact, is irrelevant and immaterial in a proceeding against petitioner because of its use of such false and misleading practices. They further aver that such papers would not in any way tend to prove that such methods as are charged against the petitioner herein in the complaint of the Commission have long been recognized as fair, proper and honorable, or that persons have not been misled or deceived thereby, or that competitors have not complained or could not complain of petitioner's conduct.

(16) Answering the averments of Paragraph (16), respondents would show that said order of the Commission refusing petitioner's application for subpœnas duces tecum is reviewable by the Circuit Court of Appeals in a proceeding in accordance with Section 5 of the Federal Trade Commission Act which provides:

> " * * * If such person, partnership or corporation fails or neglects to obey such order of the Commission while the same is in effect, the Commission may apply to the Circuit Court of Appeals of the United States within any circuit where the method of competition in question was used or where such person, partnership or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the Court shall cause notice thereof to be served upon such person, partnership or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the Court for leave to adduce additional evidence, and shall show to the satisfaction of the Court that such ad-

31 ditional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside or modify orders of the commission shall be exclusive. * * *"

Under the provisions of this section, as construed by the courts, if competent, material and relevant evidence has been excluded by the Commission, the case is remanded to the Commission with directions to admit the same; and the courts safeguard the rights of a respondent to the end that the respondent may have the benefit of a fair trial of the facts at issue. This provides adequate remedy to

petitioner for the correction of any error upon the part of the Commission in the conduct or course of the proceeding
prescribed by Section 5 of the Federal Trade Com-
32 mission Act. Respondents therefore deny that peti-
tioner has not by law other adequate and efficient remedy for correction of the Commission's action in denying its application for such subpœnas duces tecum, if such be erroneous. They further deny that such action of the Commission was without warrant or right, or amounts to an invasion of petitioner's constitutional privileges, or prevents it from duly and properly showing cause why an order should not be entered against it requiring it to cease and desist from certain practices.

(17) Answering the averments of Paragraph (17), respondents say that there is no present intention of setting a time and place for hearing in the proceeding before the Commission until this petition for mandamus has been disposed of, and they deny that said subpœnas duces tecum are necessary to enable petitioner adequately, properly and duly to defend itself, or that without said subpœnas duces tecum it will be deprived of its property or rights without due process of law, and they further deny that petitioner has ever been refused subpœnas ad testificandum.

(18) They deny the averments of Paragraph (18) because of the facts and reasons specifically set out in Paragraph (16) and elsewhere of this answer and return.

Answering the petition generally, respondents say:

1. The statute creating the Federal Trade Commission and defining its duties and powers does not specifically direct it to issue subpœnas duces tecum upon the application of a respondent before it. The only power of the Commission to issue subpœnas duces tecum is conferred by Section 9 of said Act, in the following language:

> "* * * and the commission shall have power to require by subpœnas the attendance and testimony of witnesses and the production of all such documentary evidence re-
> lating to any matter under investigation. Any mem-
> 33 ber of the commission may sign subpœnas, and mem-
> bers and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence. Such attendance of witnesses, and the produc-

tion of such documentary evidence, may be required from any person in the United States, at any designated place of hearing."

Clearly, such language compels the Commission to exercise its judgment and discretion in the issuance of subpœnas duces tecum.

2. It appears upon the face of the petition herein that petitioner has filed an application for subpœnas duces tecum to certain parties, and that the Commission, after due consideration and in the exercise of its sound judgment and discretion, denied petitioner's application for said subpœnas duces tecum and refused to issue the same. The petition herein does not, therefore, state facts sufficient to entitle petitioner to the issuance of a writ of mandamus herein, or to any relief in this cause.

3. The mandatory clause of the petition and rule, and of the proposed writ herein, is so framed as to incorporate and constitute a decree by this Court vacating and setting aside the action of the Commission taken in the due exercise of the judgment and discretion vested in it by law, in denying said application for subpœnas duces tecum, and substituting other action therefor. Upon no facts alleged, or that might be alleged, is petitioner entitled to a writ of mandamus for the accomplishment of such purpose, or to reverse any decision of the Commission so made, and the petitioner is, therefore, entitled to no writ of mandamus herein.

4. The petitioner herein does not allege a refusal by respondents to assume jurisdiction of, and consider or pass upon, the application for subpœnas duces tecum referred
to in said petition and in the mandatory clause of the
34 proposed writ of mandamus herein, or action beyond
and outside the jurisdiction of respondents. The petition herein does not, therefore, state facts sufficient to entitle petitioner to the issuance of a writ of mandamus herein, or to any relief in this cause.

5. Any findings of fact the Commission may hereafter make and incorporate in its written report in the proceeding before it, and any order to cease and desist the Commission may hereafter make, enter and issue therein, will have no binding force and effect upon the rights of the petitioner, unless and until such findings of fact shall have

been accepted and approved by a proper Circuit Court of Appeals upon a petition duly filed therein by the Commission to enforce such order to cease and desist, or upon a petition to review such order duly filed by petitioner in such Court; and unless and until such Court shall affirm such order, or modify the same and affirm such order so modified.

Such Circuit Court of Appeals upon any such petition, would take original jurisdiction of the proceeding and of the entire record thereof, and would have full original jurisdiction of all questions presented by such record and full power to decide the same. If it shall appear from the application for subpœnas duces tecum referred to in the petition herein, or from any other part or parts of the record in said proceeding, that the petitioner has been denied the benefit of a fair trial of any issue or issues in said proceeding, such Court has full jurisdiction, authority and power so to declare, and to reject such findings and hold them for naught, and thereupon to vacate any order to cease and desist which the Commission may have made, entered or issued thereon, or to remand the proceeding to the Commission with directions to issue said sub-
35 pœnas duces tecum.

There is no right expressly given by law for the filing of applications for subpœnas duces tecum by respondents before the Commission, nor is any power or duty expressly created by law commanding or enjoining the Commission to issue subpœnas duces tecum upon such application by respondents before it. If the record in the proceeding and said application for subpœnas duces tecum show erroneous action on the part of the Commission upon said application for subpœnas duces tecum, and if the Commission shall thereafter make findings of fact adverse to the respondent in the proceeding before it, and shall thereupon make, enter and serve upon such respondent an order to cease and desist, the statute expressly gives to such respondent a full, adequate and efficient remedy.

Wherefore, the petition herein does not state facts sufficient to constitute a cause of action, or to entitle petitioner to the issuance of a writ of mandamus herein, or to any relief herein.

6. The Commission is nowhere expressly directed to issue subpœnas duces tecum upon the application of a respond-

ent before it. The only power to issue subpœnas duces tecum is that given under Section 9 of the Federal Trade Commission Act, as set out above. Clearly, it was intended that the Commission should use its judgment and discretion in issuing subpœnas duces tecum, and not allow one who happens to be a respondent before it to use such processes arbitrarily and unwarrantedly to obtain knowledge of its competitors practices and methods. That others
may be using similar or identical fraudulent practices
36 is not material or revelant in the proceeding against
this petitioner because of its use of such fraudulent practices.

7. The complaint of the Commission in the proceedings before it relates to the sales of, and offers to sell, by the petitioner herein, publications distributed by it, and not to the sales of, or offers to sell, such publications by other parties; and petitioner should not be allowed to use the pro-esses of the Commission to obtain information of the methods and practices used by others in selling or attempting to sell the publications distributed by petitioner, and documents which only show the practices and methods of others in selling and offering to sell petitioner's publications are irrelevant and immaterial to the charges in the complaint of the Commission.

8. It was certainly not intended that the Commission should indiscriminately issue subpœnas duces tecum upon the mere request of a respondent before it. The Commission has been criticised by the Courts for issuing subpœnas duces tecum without sufficient foundation. Clearly, then, the Commission should not allow a respondent before it to use its subpœnas duces tecum for fishing expeditions into competitors' papers to find out what such competitors are doing or what methods they are using. The relevancy and materiality of such papers should clearly appear before the Commission should issue such subpœnas duces tecum.

9. There is nothing in the record tending to show that the papers and documents for which petitioner requests subpœnas duces tecum would in any way tend to prove the facts which petitioner claims it desires to establish by them. The petition herein does not, therefore, state a case en-
titling petitioner to a writ of mandamus herein, or
37 to any relief in this cause.

10. The application for subpœnas duces tecum is so indefinite and uncertain with reference to the papers and

documents for which subpœnas duces tecum are requested that subpœnas duces tecum drawn in accordance with said application would fail to notify the parties upon whom it is requested that said subpœnas be served with reasonable certainty what papers and documents are required, and would require that they bring in a great mass of documents relating to the details of their businesses, and such would amount to an unreasonable search and seizure. Efforts to obtain subscription circulation by means of mailed circulars and literature are made by publishers about four or five times a year. There are generally mailed at such times, in one envelope, three pieces of literature. The petitioner requests this literature for five years. This would mean about seventy-five documents from each of the concerns to be subpœnaed for each of the magazines which they distribute. Some of these concerns distribute seven or eight magazines. Taken in its narrowest scope, therefore, such subpœnas duces tecum as petitioner requests would mean about six hundred documents from each of such concerns.

11. The gravamen of the charge against petitioner in the proceeding before the Commission is that it makes false and misleading representations in its efforts to obtain subscription circulation to the publications distributed by it. The documents for which petitioner requests the Commission to issue subpœnas duces tecum are not confined to documents showing similar practices, if such there be, on the part of its competitors, but include all documents which
would show that any of those to whom such sub-
38 pœnas might be issued has made or makes repre-
sentations similar to those petitioner is charged with
falsely making, though such representations by its competitors be wholly true and in no way contain any false or misleading statement. The petition does not, therefore, state a case which entitles petitioner to a writ of mandamus herein, or to any relief in this cause.

12. In order for this writ of mandamus to issue it must be decided that the issuing of subpœnas duces tecum by the Federal Trade Commission is purely a ministerial act, or that its act in refusing to issue such subpœnas was arbitrary and unwarranted, and that such subpœnas duces tecum would violate no rights of those to whom they are issued.

13. The allegations of the petition do not state a case which entitles petitioner to the writ of mandamus as

prayed for, or to any writ of mandamus. Wherefore, respondents pray that said petition for writ of mandamus be denied.

FEDERAL TRADE COMMISSION,
EDGAR A. McCULLOCH,
Chairman;
GARLAND S. FERGUSON, Jr.,
C. W. HUNT,
WILLIAM E. HUMPHREY,
CHARLES H. MARCH,
Commissioners,
By ROBERT E. HEALY,
Chief Counsel Federal Trade Commission;
ADRIEN F. BUSICK,
Asst. Chief Counsel;
BALDWIN B. BANE,
Its Attorneys.

39 District of Columbia, *ss:*

Edgar A. McCulloch being first duly sworn on his oath says:

That he is now and has been continuously since the 11th day of February, 1927, a duly appointed and commissioned member of the Federal Trade Commission, one of the defendants in this cause:

That he has been authorized by the Federal Trade Commission and the several members thereof to make this affidavit for and on behalf of said Federal Trade Commission and of each and all of the members thereof;

That he makes this affidavit for and on behalf of said Federal Trade Commission, of himself and of each and all of the defendants to said petition and rule to show cause in this cause as set forth in the caption of this answer and return;

That he has read the above and foregoing joint answer and return of the defendants to this petition and to the rule issued in this cause and avers that all allegations of fact therein are true;

E. A. McCULLOCH.

Subscribed and sworn to before me, the undersigned, a notary public in and for the District of Columbia, this 8th day of May, 1929.

[Seal F. C. Baggarly, Notary Public, District of Columbia.]

F. C. BAGGARLY.

My commission expires on the 28 day of December, 1933.

40 Receipt of a copy of this answer and return is acknoweldged this 9 day of May, 1929.

HARVEY RABBITT.
HARRY LOVE.
JAMES H. SYKE.

41 EXHIBIT "A."

UNITED STATES OF AMERICA:

Before the Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

SIRS:

Please take notice that the respondent requests that subpœnas be issued for the 18th day of March, 1929, at ten o'clock at the office of the Federal Trade Commission, Post Office Building, New York City, on its behalf for the following witnesses:

Malcolm W. MacGowan, 17 West 46th Street, New York City.
Andrew Davlin, 5 Columbus Circle, New York City.
A. E. Turner, 30 Irving Place, New York City.
F. G. Mulker, General Post Office, New York City.
Arthur W. Crowley, 511 East 164th Street, New York City and that subpœnas duces tecum be issued for the same day for the following witnesses requiring them and each of them to bring with them copies of any and all literature used by their respective companies from the years 1922 to date in the solicitation of subscription circulations to the

publications and periodicals published by each of such companies.

McCall's Magazine by Lowell Shumway, 236 West 37th Street, New York City.

Crowell Publishing Company by Robert Messler, 250 Park Avenue, New York City.

Crowell Publishing Company by Thomas Stewart, 250 Park Avenue, New York City.

Doubleday, Doran & Co. by Charles K. Roe, Garden City, Long Island, N. Y.

The Review of Reviews by F. N. Stone, 55 Fifth Avenue, New York City.

Butterick Publishing Co. by Ronald H. Bachman, Spring & McDougall Streets, New York City.

42 International Magazine Co. by T. J. Buttikofer, Eight- Avenue and 57th St., New York City.

Conde Nast Publications by Thomas Kernan, Greenwich, Conn., or 420 Lexington Avenue, New York City.

Franklin Square Agency by F. M. Singson. 49 East 33rd Street, New York City.

Dated New York, March 4, 1929.

Yours, etc.,

JOSEPH SCHULTZ,
Attorney for Respondent.

Office & P. O. Address: 522 Fifth Avenue, Borough of Manhattan, City of New York.

To Federal Trade Commission.

43 EXHIBIT "B."

WTK:MH.

March 9, 1929.

Joseph Schultz, Esq.,
522 Fifth Avenue,
New York, N. Y.

In re Docket 1549—McFadden Publications, Inc.

DEAR SIR:

Your request under date of March 4, 1929, for 6 subpœnas duces tecum has been referred to me, and I am required to make a recommendation to the Commission as to your request. I find some difficulties in the way which I wish you to consider. First, let me say I do not wish to hinder or embarrass you in any way in presenting your defense or raising such questions as you think ought to be presented either to the Commission or to the courts. It is proper and probably necessary that the Commission issue subpœnas for witnesses needed by respondents. There seems to be in the act, however, no provision for action by respondents to compel obedience to the subpœnas which the Commission issues. Such an application must be made, I judge, in case of disobedience by the Commission. It would not be fair to respondents to issue subpœnas on their behalf which the Commission would be unwilling to attempt to enforce by applications to the courts. Furthermore, in trying to decide what to do, analogies by reference to equity practice may be helpful.

It is claimed that in the Federal Equity Courts subpœnas duces tecum do not issue except upon the order of the court based on representations of facts which show reasonable possibility that papers demanded are material, relevant and competent. No such showing appears in your application. Furthermore, is there reasonable ground to believe that all the documents you demand of these witnesses are evidence? Or do you wish to examine them to discover evidence? If the latter, do you not run counter to the 4th Amendment and the decisions under it? Are you willing to tell me whether these prospective witnesses are apt to obey or to refuse? Also if your 44 purpose is to attempt to prove that certain competitors are using the same or similar methods as those used by your client and alleged to be unfair, would it not be best to have the question ruled on in one typical instance before bringing in what may possibly amount to a very large volume of papers?

It will be helpful to me if you will indicate your views on all these points, and if you will also consider whether you can improve your application.

The other subpœnas will be issued today.

Very truly yours,

ROBT. E. HEALY,
Chief Counsel.

45 EXHIBIT "C."

Law Offices of Joseph Schultz, 522 Fifth Avenue, New York.

Telephone: Vanderbilt 3546.

In the Matter of Macfadden Publications, Inc.; Docket No., 1549.

March 14th, 1929.

Federal Trade Commission,
Washington, D. C.

Attention Hon. Robert E. Healy.

DEAR JUDGE HEALY:

This is to acknowledge receipt of your letter of March 12th in the above matter, advising me of the postponement of the hearing from March 18th to March 28th, 1929.

In response to your prior communication of March 9th, permit me to say that I am quite confident that, if the Commission issues the subpœnas duces tecum requested by me and referred to in your said letter, none of the corporations and individuals whose attendance will be so required will in any way resist such process.

In regard to the proof which I intend to elicit from such witnesses and from the documents to be produced by them, I assure you that it is my purpose and intention to keep the record within reasonable bounds and if possible, to offer only such papers as may be necessary to give to the Commission and to the courts, if necessary, proof of material and relevant facts as I view such facts to be relevant and material.

I must, in order to properly protect my client's interest, make an offer of proof and ask for admission into the evidence of such documents as the respondent deems relevant to its defense and if such documents or proof be excluded by the trial examiner to mark the same for identification so that they may be subsequently before a reviewing tribunal.

Very truly yours,

(Signature illegible.)

JS:RR.

46 EXHIBIT "D."

March 16, 1929.

D. 1549.

Mr. Joseph Schultz,
525 Fifth Avenue,
New York, N. Y.

DEAR SIR:

I have your letter of the 14th instant, and in view of your statements therein the subpœnas duces tecum requested by you have been issued and served.

Yours very truly,

ROBT. E. HEALY,
Chief Counsel.

BBB/hbh.

47 EXHIBIT "E."

Law Offices of Joseph Schultz, 522 Fifth Avenue, New York.

Telephone: Vanderbilt 3546.

March 26th, 1929.

Hon. Robert E. Healy,
Federal Trade Commission,
Washington, D. C.

Re Macfadden Publications, Inc.; Docket No., 1549.

DEAR JUDGE HEALY:

I have this day telegraphed you as follows:

Regarding Macfadden publications docket number fifteen forty-nine am advised that witnesses subpœnaed are moving to vacate same cannot proceed with defense on twenty-eighth Please advise me regarding adjournment at least one week pending determination of application to vacate subpœnas and my determination regarding proceeding to compel obedience or in alternative my devision to stipulate with Commission regarding practices complained of.

I wrote you after my talk with you concerning the issuance of subpœnas and advised you that it was my understanding that the witnesses for whom subpœnas were being requested were not hostile and would gladly obey such process and produce the documents called for.

Much to my surprise this morning for the first time I learned that counsel for these witnesses had advised them to make application to vacate such subpœnas. I suspect what motivates these witnesses to such desire.

Accordingly it becomes necessary for me to obtain an adjournment to determine whether an application should be made to enforce obedience to such subpœnas or whether my client having been so duly advised cannot and should not take a different position in the premises than it has heretofore.

If an adjournment is so granted it is my desire to meet you and to discuss with you the further conduct of this matter. Such an appointment at your convenience would be appreciated.

48 Please be good enough to advise me by telegram what disposition will be made of my request for an adjournment. I am sure you appreciate my circumstances and how utterly impossible it is for me, in view of what has transpired, to proceed in an orderly fashion. I have built up my case on the theory that these witnesses would give certain testimony pursuant to my understanding that they would produce their documents and comply with the subpœna. I had, as a matter of fact, been given the impression that these witnesses would so appear and so produce their documents whether subpœnaed or not.

Thanking you for your courtesy,

Sincerely yours,

(Signature illegible.)

JS:RR.

49 EXHIBIT "F."

EXHIBIT "A."

Filed May 9, 1929.

Subpœna Duces Tecum.

UNITED STATES OF AMERICA:

Federal Trade Commission.

To T. J. Buttikoffer,
International Magazine Co.,
8th Ave. & 57th St.,
New York, N. Y.:

You are hereby required to appear before Edward M. Averill, an Examiner of the Federal Trade Commission, at Room 803, 45 Broadway, in the City of New York, N. Y., on the 28th day of March, 1929, at 10:00 o'clock A. M. of that day, to testify at the instance of respondent, Macfadden Publications, Inc., in the matter of Macfadden Publications, Inc., Docket 1549.

And you are hereby required to bring with you and produce at said time and place the following books, papers and documents:

Copies of any and all literature used by the International Magazine Company from the year 1922 to date, in the solicitation of subscription circulations to the publications and periodicals published by the International Magazine Company.

Fail not at your peril.

In testimony whereof, the undersigned, a member of the Federal Trade Commission, has hereunto set his hand and caused the seal of said Federal Trade Commission to be affixed at Washington, D. C., this 16th day of March, 1929.

[SEAL.] W. E. HUMPHREY,
Commissioner.

Notice to Witness.—If claim is made for witness fee or mileage, this subpœna should accompany voucher.

50 EXHIBIT "G."

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Petition.

Filed May 9, 1929.

To the Honorable Federal Trade Commissioners of the United States of America:

Thomas Stewart alleges and petitions:

1. That in this proceeding before the Federal Trade Commission, your petitioner has been served with a subpœna duces tecum at the instance of the respondents, directing that he appear before Edwin M. Averill, an examiner of the Commission, in New York City, on the 28th day of March, 1929, and bring with him copies of any and all literature used by the Crowell Publishing Company from the year 1922 to date, in the solicitation of subscriptions by circulars to the publications and periodicals published by The Crowell Publishing Company.

2. That your petitioner respectfully represents that the said subpœna duces tecum is invalid upon the grounds that the evidence to the adduced thereby before the examiner is wholly immaterial to the investigation because it is proposed to show thereby that the trade practices used by Macfadden Publications, Inc., which are now being investigated by the Commission, are common practices among reputable publishers and that this fact justifies their use by Macfadden Publications, Inc.

Your petitioner further shows that the said subpœna
duces tecum is most general and indefinite in its —
51 that it requires the production of many hundreds of
documents which are difficult to collect and it will
amount to a hardship to be required to produce this material.

Your petitioner further shows that the production of the material called for by the subpœna duces tecum will have the effect of laying bare the system and practices used by The Crowell Publishing Company in the solicitation of subscriptions to its competitors and will render their peculiar value to The Crowell Publishing Company almost useless because it will deprive the system and practices of their exclusive use.

Your petitioner further represents that the practice of the respondent herein amounts to an abuse of processes of this Commission in that it does not seek to limit or define the extent or the purposes in the subpœna that it has procured.

3. Your petitioner files this petition to have the Commission review the validity of the said subpœna duces tecum in this proceeding.

Wherefore petitioner prays that the subpœna duces tecum heretofore served upon said petitioner in this proceeding be vacated and set aside by the Commission and that an order be entered forthwith to this effect.

Petitioner further prays that the return day of the subpœna herein be extended at least one week after the determination of this Commission upon this petition. Dated, New York, March 26, 1929.

(Signed) THOMAS STEWART,
Petitioner.
" WHITE & CASE,
His Attorneys.

52 EXHIBIT "H"

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Petition.

Filed May 9, 1929.

To the Honorable Federal Trade Commission of the United States of America:

Robert Messler alleges and petitions:

1. That in this proceeding before the Federal Trade Commission, your petitioner has been served with a subpœna

duces tecum at the instance of the respondents, directing that he appear before Edwin M. Averill, an examiner of the Commission, in New York City, on the 28th day of March, 1929, and bring with him copies of any and all literature used by The Crowell Publishing Company from the year 1922 to date, in the solicitation of subscriptions by circulars to the publications and periodicals published by The Crowell Publishing Company.

2. That your petitioner respectfully represents that the said subpœna duces tecum is invalid upon the grounds that the evidence to be adduced thereby before the examiner is wholly immaterial to the investigation because it is proposed to show thereby that the trade practices used by Macfadden Publications, Inc., which are now being investigated by the Commission, are common practices among reputable publishers and that this fact justifies their use by Macfadden Publications, Inc.

Your petitioner further shows that the said subpœna duces tecum is most general and indefinite in its
53 scope in that it requires the production of many hundreds of documents which are difficult to collect and it will amount to a hardship to be required to produce this material.

Your petitioner further shows that the production of the material called for by the subpœna duces tecum will have the effect of laying bare the system and practices used by The Crowell Publishing Company in the solicitation of subscriptions to its competitors and will render their peculiar value to The Crowell Publishing Company almost useless because it will deprive the system and practices of their exclusive use.

Your petitioner further represents that the practice of the respondent herein amounts to an abuse of processes of this Commission in that it does not seek to limit or define the extent or the purposes in the subpœna that it has procured.

3. Your petitioner files this petition to have the Commission review the validity of the said subpœna duces tecum in this proceeding.

Wherefore petitioner prays that the subpœna duces tecum heretofore served upon said petitioner in this proceeding be vacated and set aside by the Commission and that an order be entered forthwith to this effect.

Petitioner further prays that the return day of the subpœna herein be extended at least one week after the determination of this Commission upon this petition.

Dated, New York, March 26, 1929.

(Signed) ROBERT T. MESSLER,
Petitioner.

" WHITE & CASE,
His Attorneys.

54 EXHIBIT "I."

UNITED STATES OF AMERICA:

Before the Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Petition and Motion to Set Aside and Quash Subpœna Duces Tecum to Lowell Shumway.

Filed May 9, 1929.

To the Honorable the Federal Trade Commission:

The petition of Lowell Shumway respectfully shows:

1. The petitioner resides at 1900 Albemarle Road, Brooklyn, New York City, and is employed as subscription sales manager by the McCall Company, which the petitioner is informed and verily believes is a corporation organized and existing under and pursuant to the laws of the State of New York, with a place of business at 236-250 West 37th Street, in the Borough of Manhattan, New York City. The McCall Company is engaged in publishing and distributing McCall's a monthly publication, as well as other publications.

2. The petitioner appears specially herein for the purpose of making this objection and motion and for no other purpose, and objects to the service upon him of the *subpœna duces tecum* dated March 16, 1929, and does hereby respectfully move Your Honorable Commission that the service of said *subpœna duces tecum* be set aside and the

said *subpœna duces tecum* be quashed, upon the following grounds:

55 3. The petitioner is required by the said subpœna to produce—

"Copies of any and all literature used by your company from the year 1922 to date, in the solicitation of subscription circulations to the publications and periodicals published by your company:"

but your petitioner has not the custody of such papers and documents, and is not charged with the duty of such custody, and any such papers and documents are in the possession and control of the McCall Company and in the custody of some person or persons other than your petitioner.

4. The complaint herein dated November 24, 1928, and the answer of MacFadden Publications, Inc., filed herein December 22, 1928, contain no statement of any fact showing the necessity, relevancy or materiality of papers and documents belonging to the McCall Company, the production of which by your petitioner is called for by the said *subpœna duces tecum*.

5. The McCall Company is not a corporation being investigated or proceeded against in the above-entitled proceeding.

6. The papers and documents belonging to The McCall Company, the production of which by your petitioner is called for by the said *subpœna duces tecum*, have not been shown to, and do not, relate to any matter under investigation by your Honorable Commission in this proceeding.

7. Your petitioner has never been employed by the respondent MacFadden Publications, Inc., and has had no
participation in the acts of the respondent described
56 in the complaint herein; and, your petitioner is informed and verily believes, there is no community of interest between The McCall Company and the respondent.

8. The demand for the production of the said papers and documents, contained in said *subpœna duces tecum*, is unauthorized, illegal, unconstitutional and void for the additional reasons:

(*a*) The demand contained in said *subpœna duces tecum* is general in its scope; does not set forth the specific documents which are required to be produced, and would require the production of a large mass of papers and documents relating to the business and affiairs of The McCall Company for more than seven years last past.

(*b*) Compliance with said demand would subject the McCall Company to unreasonable and heavy expenses, and interrupt and interefere with the conduct of its business.

(*c*) Said demand, if enforced, would constitute an unreasonable search and seizure of the papers and effects of The McCall Company, involving its business relations with others than the respondent, intrastate as well as interstate, without any warrant and without probable cause, and is not supported by oath or affirmation particularly describing the place to me searched or the specific papers or effects to be seized.

57 (*d*) Said demand is unreasonable and arbitrary in scope, extent and effect, and said demand and said Federal Trade Commission Act, if it authorizes said demand, are in violation of the Fourth Article of Amendment to the Constitution of the United States of America, and said demand if enforced would deprive the McCall Company and its customers of its and their liberty and property, without due process of law, in violation of the Fifth Article of Amendment to the Constitution of the United States of America.

Wherefore the petitioner prays that the *subpœna duces tecum*, heretofore served upon him, be set aside and quashed.

Dated New York, March 26, 1929.

(Signed) LOWELL SHUMWAY,
Petitioner.

WHITMAN, RANSOM, COULSON & GOETZ,
Attorneys for the Petitioner, 120 *Broadway*,
Borough of Manhattan, City of New York,
N. Y.

58

EXHIBIT "J."

Before the Federal Trade Commission.

Docket No. 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Petition to Vacate Subpœna Duces Tecum.

Filed May 9, 1929.

The petition of Charles K. Roe, in his own behalf and in behalf of Doubleday, Doran & Co., Inc., of Garden City, Long Island, New York, respectfully shows:

1. That your petitioner has been served by mail with a subpœna duces tecum dated March 16, 1929, directing him to produce in behalf of the respondent, before Edward M. Averill, Esq., an examiner, at Room 803, 45 Broadway, New York, March 28, 1929, the following:

"Copies of any and all literature used by Doubleday, Doran & Company for the year 1922 to date in the solicitation of subscription circulations to the publications and periodicals published by Doubleday, Doran & Company."

2. Your petitioner alleges that said subpœna duces tecum is wholly indefinite and calls for the production of a mass of unidentified material the production of which would work a hardship upon your petitioner and his employer, Doubleday, Doran & Co., Inc. Said Doubleday, Doran & Co., Inc., over said period of seven years from 1922 to date have issued a very large quantity of such literature and your petitioner is quite at a loss to know what material he is called upon to produce on this examination. Any attempt to comply literally with the terms of said subpœna duces tecum would involve an extraordinary amount of labor and time and an interruption of said Company's business. 59

3. Your petitioner respectfully shows, moreover, that he is informed and believes and is by counsel advised that said material called for by said subpœna duces tecum is wholly irrelevant to the proceeding and has no bearing on the issue of said proceeding.

4. Your petitioner respectfully requests that he be granted a hearing on this application to vacate said subpœna duces tecum.

All of which is respectfully submitted.

(Signed) CHARLES K. ROE,
Petitioner.
KELLOGG, EMERY & INNESS-BROWN,
Attorneys for Petitioner,
120 *Broadway, New York City.*

Subscribed and sworn to before the undersigned Notary Public in and for the County of New York, State of New York, this 26th day of March, 1929.

[Notary Seal and Registration.]

(Signed) GEORGE KOEGLER.

60 Exhibit "K."

United States of America:

Before Federal Trade Commission.

Docket, 1549.

In the Matter of Macfadden Publications, Inc.

Motion to Vacate Subpœna.

The petition of F. M. Singsen respectfully shows to the said Commission that your petitioner resides at No. 123 Quackenbush Avenue, Dumont, New Jersey; that a subpœna of which a copy is annexed hereto was served on your petitioner on the 25th — March 1929 at 49 East 33rd Street, New York City; that deponent is unaware of the exact nature of the proceedings instituted against Macfadden Publications, Inc., Docket 1549, but is warranted in the belief that it is claimed by the Trade Commission that in some manner the respondent therein Macfadden Publications Inc. has violated certain of the provisions of the Federal Trade Commission Act and the rules, regulations and decisions of the Federal Trade Commission; that neither your petitioner nor the Franklin Square Agency is a party to the proceeding in which the subpœna was issued; that the literal reading of said subpœna would require your petitioner to produce at said time and place the following books, papers and documents:

61 "Copies of any an all literature used by the "Franklin Square Agency from the year 1922 to "date, in the solicitation of subscribtion circulations to "the publications and periodicals published by the Franklin "Square Agency."

The Franklin Square Agency is not a publisher of periodicals or publications and therefore has no literature of the character called for by the subpœna; its business is the sale of publications of other publishers and the literature issued by it carries the advertisement of publishers by whom the text is supplied.

Deponent further states that on the advice of counsel such literature as is called for by the subpœna is not and would not be material, competent or relevant in the pending proceeding, but on the contrary the same would be and is incompetent, irrelevant and immaterial, and inadmissible in evidence.

The proceeding as above stated is directed against the Macfadden Publications Inc. and no one else; the circularization for subscription of deponent and the literature connected therewith is not under examination either in the above-entitled proceeding or in any other pending proceeding; that the acts of deponent in securing subscriptions by advertisement, circularization, or otherwise would
62 or should neither damage nor benefit the respondent in the pending proceeding, or be evidence in any case admissible to support the conclusions of the Federal Trade Commission.

Wherefore your petitioner prays that said citation be vacated and set aside and a stay granted pending the hearing on this petition.

Respectfully submitted,
(Signed) F. M. SINGSEN.
LARKIN, ANDREWS &
McNAUGHTON,
Attorneys for Petitioner,
32 Liberty Street, New York, N. Y.

Dated at New York City this 26th day of March, 1929.

63 EXHIBIT "L."

Filed May 9, 1929.

Docket No., 1549.

FEDERAL TRADE COMMISSION, Complainant,

against

MACFADDEN PUBLICATIONS, INC., Respondent.

To the Federal Trade Commission of the United States:

The petition of T. J. Buttikoffer respectfully shows:

1. That your petitioner is the Director of Circulation of the International Magazine Company, Inc., with offices at International Magazine Building, 57th Street at 8th Avenue, Borough of Manhattan, City of New York.

2. That on or about March 18, 1929, your petitioner received by mail a subpœna duces tecum, a copy of which is hereto annexed and marked "Exhibit A." The said subpœna duces tecum requires your petitioner to appear before Edward M. Averill, an examiner of the Federal Trade Commission, at Room 803, No. 45 Broadway, New York City, on March 28, 1929, at 10:00 a. m., and bring with him copies of any and all literature used by the International Magazine Company from the year 1922 to date, in the solicitation of subscription circulations to the publications and periodicals published by the International Magazine Company, Inc.

3. That your petitioner respectfully submits that the said subpœna duces tecum is too indefinite, in that it does not indicate any specific documents which are desired, but requires the production of a large number of documents which are difficult to collect and which, if produced, are so voluminous that the examination of them would require a long period of time.

64 4. That your petitioner respectfully submits that the said subpœna duces tecum is invalid upon the ground that the literature which your petitioner is directed to produce is wholly immaterial to the above-entitled proceeding because the apparent purposes is to show that the trade practices used by the MacFadden Publications, Inc.,

which are now being investigated by your Honorable Commission, are common practices among reputable publishers and that this fact justifies their use by the above-named respondent. Your petitioner further submits that as neither the International Magazine Company, Inc., nor any of the publications controlled by it, are in any way involved in the proceeding against the MacFadden Publications, Inc., any literature used by it in the solicitation of magazine subscriptions is incompetent and immaterial in the above entitled proceeding.

5. That your petitioner files this petition to have the Commission review the validity of the said subpœna duces tecum in this proceeding.

Wherefore your petitioner respectfully requests that the said subpœna duces tecum be in all respects vacated and set aside and that an order be entered forthwith to this effect.

Your petitioner further prays that the return day of the said subpœna duces tecum be extended until eight days after the entry of the order to be entered upon the determination of this petition.

Dated, New York, March 26, 1929.

(Signed) THOMAS J. BUTTIKOFFER,
Petitioner.

WILLIAM A. DEFORD (?),
Attorney for Petitioner.

65 EXHIBIT "M."

Before Federal Trade Commission.

Docket No., 1549.

In the Matter of MACFADDEN PUBLICATIONS, INC.

Petition to Vacate Subpœna Duces Tecum.

Filed May 9, 1929.

The petition of F. W. Stone (herein designated as F. N. Stone), in his own behalf and in behalf of the Review of Reviews Corporation of New York City (herein designated as The Review of Reviews) respectfully shows:

1. That your petitioner has been served by mail with a subpœna duces tecum, dated March 16, 1929, directing him to produce, in behalf of the respondent herein, before Examiner Edward M. Averill, Esq., at 45 Broadway, New York City, at 10:00 o'clock in the forenoon on March 28th, 1929, the following:

> "Copies of any and all literature used by The Review of Reviews from the year 1922 to date, in the solicitation of subscription circulations to the publications and periodicals published by The Review of Reviews."

2. Said The Review of Reviews Corporation, over a period of seven years, from 1922 to date, has in the course of its business printed and distributed a great quantity of literature in the solicitation of subscriptions to the publications and periodicals published by said company. The subpœna *duces tecum* served upon your petitioner is wholly indefinite and makes no attempt to identify the material which the respondent wishes to have produced. Your petitioner is unable to determine what material he is
66 expected to produce at the hearing on March 28,
1929, and an attempt to comply literally with the terms of the subpœna, if not actually impossible, would work a distinct hardship upon both the petitioner and The Review of Reviews Corporation. The amount of time and labor involved in a literal compliance with the terms of said subpœna *duces tecum* would cause a serious interruption to the said company's business.

3. Your petitioner is advised by his counsel and believes that the material called for by the said subpœna *duces tecum* is wholly irrelevant to this proceeding and has no bearing upon the issues involved in said proceeding.

4. Your petitioner respectfully requests that he be granted an opportunity to be heard upon this application to vacate said subpœna *duces tecum*.

All of which is respectfully submitted.

(Signed) FRED W. STONE,
Petitioner.

Subscribed to and sworn to before the undersigned Notary Public in and for the County of New York, State of New York, this 27th day of March, 1929.

[Seal and registration.]

(Signed) JOHN J. DURAND,
Notary Public.

KELLOGG, EMERY & INNESS-BROWN,
Attorneys for Petitioner,
120 *Broadway,*
New York City, N. Y.

67 *Demurrer to Answer.*

Filed Jun. 5, 1929.

* * * * * * *

Comes now Macfadden Publications Inc., the petitioner and demurs to the answer of the defendant herein and for grounds of demurrer states: that the same is insufficient because it does not state facts sufficient to constitute a defense to the action.

HARRY T. LORE,
HARVEY L. RABBITT,
JAMES H. SYKES,
Attorneys for Petitioner.

Service accepted.
BALDWIN B. BANE.

May 17, 1929.

68 Supreme Court of the District of Columbia.

Monday, May 20th, 1929.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice, presiding.

* * * * * * *

This matter came on to be heard on May 17, 1929, upon the petition, rule to show cause, answer and return and general demurrer by the petitioner to the answer; thereupon, after argument by counsel for petitioner, it is ordered, that the demurrer be overruled, the rule to show cause discharged and the cause then being considered on petition and answer, it is ordered that the petition be denied.

To this ruling of the court petitioner prays an exception which is hereby allowed.

To the foregoing order the petitioner notes an appeal, in open court, to the Court of Appeals. Whereupon bond is fixed in the sum of $100.00 with leave to deposit $50.00 with the clerk in lieu thereof

Memorandum.

June 4, 1929.—Undertaking on appeal for $100.00 approved and filed.

69 *Assignment of Errors.*

Filed Jun. 5, 1929.

* * * * * * *

The Trial Court erred, as follows:

I. The Court erred in overruling the demurrer of the petitioner, to the respondent's answer and return filed herein.

II. The Court erred in discharging the rule to show cause, filed herein.

III. The Court erred in its Order denying the petition of the petitioner, filed herein, which Order resulted in judgment for respondent.

HARVEY L. RABBITT,
HARRY T. LORE,
JAMES H. SYKES,
Attorneys for Petitioner.

JOSEPH SCHULTZ,
Of Counsel.

70 *Designation of Record.*

Filed Jun. 11, 1929.

* * * * * * *

The Clerk of the Supreme Court of the District of Columbia, will please to prepare at petitioner's expense, a transcript of the record on appeal, including therein, the following pleadings, papers and proceedings:

Petition for writ of mandamus.
Order to show cause and that writ issue.
Alternate writ.
Answer and return.
Demurrer to answer.
Order overruling demurrer, discharging rule to show cause, denying petition and exceptions prayed and allowed.
Memo, fixing bond on appeal and notice of appeal.
Memo. filing and approval of bond.
Assignment of errors.
Designation of record.

HARVEY L. RABBITT,
HARRY T. LORE,
JAMES H. SYKES,
Attorneys for Petitioner.

The Federal Trade Commission accepts service of a copy of this designation of record and consents that the same shall constitute the transcript on appeal.

Dated this June 5, 1929.

ROBERT E. HEALY,
Attorney for Respondent.

71 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 70, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 76601, at Law, where Macfadden Publications, Inc., is Petitioner and Federal Trade Commission et al. are Respondents, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of July, 1929.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,
By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5024. Macfadden Publications, Inc., appellant, vs. Federal Trade Commission, Edgar A McCulloch, et al., Commissioners. Court of Appeals, District of Columbia. Filed Jul. 31, 1929. Henry W. Hodges, Clerk.

FOR MR. JUSTICE ROBB.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 25 1929

Henry W. Hodges
Clerk,

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1929.

No. 5024

MACFADDEN PUBLICATIONS, INC.,

vs.

FEDERAL TRADE COMMISSION, EDGAR A. McCULLOCH, GARLAND S. FERGUSON, JR., C. W. HUNT, WILLIAM E. HUMPHREY, CHARLES S. MARCH, COMMISSIONERS, WASHINGTON, D. C.

BRIEF FOR APPELLANT.

HARRY T. LORE,
HARVEY L. RABBITT,
JAMES H. SYKES,
Attorneys for Appellant.

Of Counsel:
JOSEPH SCHULTZ,
Of New York City,
New York.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX.

SUBJECT INDEX.

Page
Statement of case 1
Argument 6
Point 1 6
2 10
3 11
4 14
5 18
6 19
7 20
Conclusion 24

CASES CITED.

John Bene & Sons, Inc., v. Fed. Trade Commission, 299 Fed., 468 6
Federal Trade Commission v. Anderson, Gratz, et al., 253 U. S., 421 7
L. B. Silver Co. v. Fed. Trade Commission, 289 Fed., 985 7
John C. Winston Co. v. Fed. Trade Commission, 3 Fed. (2d), 961 7
Ostermoor v. Fed. Trade Commission, 10 Fed. (2d), 962 8
Chicago Portrait Co. v. Fed. Trade Commission, 4 Fed. (2d), 759; 266 U. S., 42 8
Federal Trade Commission v. Beechnut Packing Co., 42 Sup. Court Reporter, 150 8
Winstead Hosiery Co. v. Fed. Trade Commission, 272 Fed., 957; 258 U. S., 483 8
Hill Bros. v. Fed. Trade Commission, 9 Fed. (2d), 481 9
Royal Baking Powder Co. v. Fed. Trade Commission, Sup. Ct., D. C., January 21, 1927 13
Milomine Co. v. Fed. Trade Commission, 254 Fed., 988 13
Chamber of Commerce of Minn. et al. v. Fed. Trade Commission, 280 Fed., 45 13
Federal Trade Commission v. Eastman Kodak Co., 274 U. S., 619 15

Page

National Harness, etc., Association v. Fed. Trade Commission (C. C. A.), 268 Fed., 705-7 16
Chamber of Commerce v. Fed. Trade Commission (C. C. A.), 280 Fed., 45, 48 16
Kansas City Southern Railway v. Interstate Commerce Commission, 252 U. S., 178 20
Minnesota Rate Cases, 230 U. S., 352 22
U. S. ex rel. St. Louis Southwestern Railway v. Interstate Commerce Commission, 290 Fed., 264 23

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1929.

No. 5024

MACFADDEN PUBLICATIONS, INC.,

vs.

FEDERAL TRADE COMMISSION, EDGAR A. McCULLOCH, GARLAND S. FERGUSON, JR., C. W. HUNT, WILLIAM E. HUMPHREY, CHARLES S. MARCH, COMMISSIONERS, WASHINGTON, D. C.

BRIEF FOR APPELLANT.

Statement of Case.

A writ of mandamus was heretofore and on the 30th day of April, 1929, issued out of the Supreme Court of the District of Columbia requiring the Federal Trade Commission to issue subpœnas and *subpœnas duces tecum* to various witnesses named in such order or, in the alternative, to show cause why such writ should not be issued.

The petition showed that on the 24th day of November, 1928, pursuant to Section 5 of the Act of Congress approved September 28th, 1924, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties and for other purposes," a proceeding was instituted by the Federal Trade Commission against Macfadden Publications, Inc., the petitioner. From the complaint annexed to such petition it appears that such corporation is charged with "using unfair methods of competition" in that, while engaged in the business of publishing and distributing magazines, periodicals and newspapers, it solicited subscriptions by representing certain savings to be enjoyed by the acceptor of such offer and by representing that such offer is made to a limited group and for a limited time. Paragraph three of the complaint alleges "the above alleged acts and practices of respondent are each and all of them to the prejudice of the public and *respondent's competitors and constitute unfair methods of competition in interstate commerce.*"

To such complaint an answer was duly interposed alleging, among other things, that the methods complained of were similar, if not identical, to those used by other persons, firms and corporations engaged in competition with the petitioner herein, the respondent therein, in the publishing business and in the solicitation of subscriptions to periodicals and that such practices had been commonly recognized as proper and ordinary; and that the conduct of the petitioner, the respondent in such proceeding, does not constitute unfair competition.

Hearings have been had on such complaint and the Commission has closed its case. Pursuant to the rules by such Commission made, the petitioner made formal application on the 4th day of March, 1929, for the issuance of *subpœnas duces tecum* to various persons, firms and corporations. Such subpœnas required the production by such persons—most of whom were competitors of the petitioner—of literature used by them in the solicitation of subscriptions for their periodicals, which literature petitioner alleges is similar to that used by petitioner and which is the subject of the complaint.

Such subpœnas duces tecum were accordingly duly issued by the Commission.

Thereafter, as is alleged in the petition, notice was received from the Commission that the *duces tecum* clause in such subpœna so issued had been vacated. Accordingly and on the 4th day of April, 1929, a verified formal petition was filed with the Commission, a copy of which is annexed to the petition and made a part thereof, requiring the issuance of *subpœnas duces tecum* to various persons therein named. It appears from such formal demand that the petitioner intends to prove by such documents and by such testimony that:

(*a*) Competitors engaged in the publishing business solicited subscriptions to their publications by similarly representing, as does the respondent, that the price of the subscriptions so offered in such literature is less than the usual, ordinary and regular price of such subscriptions.

(*b*) That such offer is represented as being made to a limited or special group.

(*c*) That such offer is made for a limited time.

(*d*) That for a long time responsible persons, firms and corporations similarly engaged in the business in which respondent is engaged, have commonly understood the practices used by the respondent in the solicitation of subscription circulation as ethical, fair and proper and that such practices have never heretofore been regarded as opposed to good morals.

(*e*) That the methods complained of do not constitute unfair competition nor is there a public interest in stopping the practices nor is a substantial portion of the public deceived thereby.

Such application was summarily denied.

The petitioner thereafter filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus, directing the Federal Trade Commission to forthwith issue subpœnas and *subpœnas duces tecum* as demanded in notice dated April 2, 1929, filed with the Federal Trade Commission.

The Federal Trade Commission filed its answer and return. Briefly it contended that:

(*a*) The evidence sought to be proven by the documents sought to be subpœnaed is incompetent, irrelevant and immaterial.

(*b*) That the documents will not prove what the petitioner claims they will.

(*c*) That the petitioner has an adequate remedy in its appeal to the Circuit Court of Appeals from the final order to be made by the Commission.

(*d*) That the Commission exercises its judgment and discretion in the issuance of *subpœnas duces tecum* and that there is no requirement in the law compelling it to issue such *subpœna duces tecum.*

(*e*) That the requirement for the witnesses to produce the records sought would permit the petitioner the opportunity of obtaining information of the methods and practices used by its competitors.

(*f*) That the issuance of the *subpœnas duces tecum* and the production of the records would be a hardship upon the witnesses.

The matter came on for hearing on May 17, 1929, before Honorable Wendell P. Stafford, Justice, presiding, at which time the petitioner filed a demurrer to the answer of the Federal Trade Commission. The matter was heard upon the petition, rule to show cause, answer and return, and general demurrer by the petition and argument by counsel for the petitioner. The demurrer was overruled, the rule to show cause discharged, and the petition denied. Whereupon, the petitioner noted an appeal.

ARGUMENT.

POINT I.

The evidence sought to be introduced is competent, relevant and material.

Although the courts have held that strict rules of practice and law do not obtain in hearings before the Federal Trade Commission as to the competency and relevancy of evidence sought to be introduced (*John Bene & Sons, Inc.*, v. *Fed. Trade Commission*, 299 Fed. 468), and although it is not for the Commission at this time to pass upon the competency of the facts *hereafter* to be introduced by the respondent, it nevertheless is clear that what the petitioner seeks to prove by the documents sought to be subpœnaed is material and necessary to its defense.

The complaint alleges that the acts complained of constitute *unfair competition against the petitioner's competitors.* It has repeatedly been held that the Commission's jurisdiction is limited solely to a case where a person, firm or corporation is engaged in business methods which unfairly compete with his competitors and thus threaten to result in a monopoly in favor of that person and to the public injury. The Federal Trade Commission Act was wholly collateral to the Sherman and other anti-trust acts. Its inquiry is properly directed only into practices which—although perfectly legal—might grant to one an unfair advantage over his competitors. What one's competitors, therefore, are doing is of prime importance. Repeatedly have the courts held that the fact that competitors are using methods similar to the ones complained of is material, relevant and competent. The Commission in its complaint has alleged that petitioner's conduct constitutes unfair competition against its competitors. The petitioner in its answer has set forth that this is not the fact. Certainly it should be permitted, by the testimony of its competitors and by the introduction of the literature used by them in soliciting subscriptions, to prove that fact. Certainly it should be permitted to prove by its competitors that the business of the petitioner comprises but a small, negligible fraction of the entire field and that a *substantial portion* of the public is not affected. This has repeatedly been held.

Federal Trade Commission v. *Anderson, Gratz, et al.*, 253 U. S. 421;

L. B. Silver Co. v. *Fed. Trade Commission*, 289 Fed. 985;

John C. Winston Co. v. *Fed. Trade Commission*, 3 Fed. (2d) 961;

Ostermoor v. *Fed. Trade Commission*, 10 Fed. (2d) 962;

Chicago Portrait Co. v. *Fed. Trade Commission*, 4 Fed. (2d) 759; 266 U. S. 42;

Federal Trade Commission v. *Beechnut Packing Co.*, 42 Supreme Court Reporter 150;

Winsted Hosiery Co. v. *Fed. Trade Commission*, 272 Fed. 957; 258 U. S. 483.

Virtues are claimed for the ruling in the Winsted Hosiery cases which an examination of that case shows it does not possess. When this case was before the Circuit Court, there was no occasion to consider the question as to whether the Act went beyond undue restriction of competition since the court concluded that the respondent's acts were not unfair. In so far as the report of that case shows, the contention that Section 5 of the Act reached only such unfair competition as tended to monopoly was in no way brought to the attention of the court. The United States Supreme Court in reversing the decision of the lower court and in the course of its opinion made reference to the fact that a "public interest was involved" and that a "substantial part of the public was still misled by the use of the labels which the Winsted Company employed" and that "the public had an interest in stopping the practices as wrong." On that decision it is contended that, irrespective of whether the practices tend to create a monopoly or not, it is sufficient to confer jurisdiction upon the Commission if a "public interest" is involved and that irrespective of whether competitors are using the same methods it could still be unfair and constitute unfair competition.

Seemingly it is forgotten that in the Winsted Company case the Supreme Court held that "competitors in that business who labeled their goods honestly were being unfairly competed against and to permit respondent—and those similarly engaged in misbranding or mislabeling—to continue the practices might tend to create a monopoly in favor of those improperly acting to the detriment of the honest merchant with the result that the monopoly thus created would injure the public."

The Commission relies apparently upon the case of *Hill Bros.* v. *Federal Trade Commission,* 9 Fed. 2nd, 481. In that proceeding a complaint was made by the Commission of a system of merchandising employed by the respondent therein, a coffee importer, in connection with price fixing and the maintaining of a minimum resale price. The respondents therein offered to prove that *publishers* throughout the country were selling *magazines* at fixed prices in other states under agreements to maintain these prices and refused to sell to dealers who had not maintained the prices agreed. Manifestly, proof of the fact that *magazine publishers* were engaged in price fixing was in no way competent in a proceeding brought against coffee importers. That is exactly what the court held and nothing more. The opinion of Rudkin, circuit judge, says furthermore as follows:

> "Proof of the method employed by others would be of little avail in any event, *unless the methods employed were similar.*"

POINT II.

It is not for the court at this time to decide what the documents sought to be subpœnaed will prove.

The Commission's return avers that the documents sought to be produced will not prove that the petitioner's competitors are engaged in similar or identical alleged misrepresentations. The Commission in its proceeding introduced in its case the literature of the petitioner herein. This literature pretended to offer term subscriptions at less than certain given prices. The Commission also introduced into evidence reports made by the publisher to the Audit Bureau of Circulation in an attempt to show that the prices there quoted as the prices for such subscription were *not* less than the offered price by the sum represented. The demand for the issuance of the *subpœnas duces tecum* require the production by the witnesses—petitioner's competitors—of their literature making identical offers and *the reports similarly made by them to the Audit Bureau of Circulation.*

Unusual legal acumen is not required to deduce therefrom that the petitioner intends to prove by both the circulars and the reports that the prices given in such reports—similarly to the petitioner's prices given in such reports—do not show the saving in the amount represented. It does not require unusual legal accumen to appreciate that the petitioner intends to contend and prove that the prices given in the reports filed with the Audit Bureau of Circulation, and introduced in evidence against the petitioner, *do not pretend to be what the Commission claims them to be and that they are not so understood by the publishing industry in general.* It will be for the court ultimately to determine whether the literature of the witnesses sought to be produced—the competitors of the petitioner—are similar or identical. Certainly the Commission cannot properly and legally refuse to require the production of such evidence because it is of the opinion that the evidence to be adduced therefrom is different from what the petitioner contends it to be.

POINT III.

The petitioner has no other remedy.

The return of the Commission makes much of the fact that its action is not judicial and that it has no power—of itself—to enforce its order, but that it merely reports and recommends, and an enforcible order can only be made by the Circuit Court of Appeals. That in such proceeding before the Circuit Court of Appeals the court has the right to remand the proceeding for further hearing and for the taking of further testimony. That if "competent, material and relevant evidence has been excluded by the Commission the case is remanded to the Commission with directions to amend the same" (Par. 7, return).

It is expressly because the Commission has no judicial function and expressly because it is merely a fact finding body and because there is no relief from its preliminary orders until after a cease and desist order has been made by it that this proceeding against it must lie. Manifestly, unless there is before the Circuit Court, as a part of the record taken by the Commission, evidence and documents properly identified, the admission of which was refused by the Commission, the Circuit Court has not before it the error committed and cannot intelligently pass upon whether such evidence was competent, relevant and material, and whether such evidence should have been admitted.

Section 5 of the Federal Trade Commission Act provides in part:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were *reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.*"

Ordinarily such a provision would apply to "newly discovered facts" or to evidence which for some reason a respondent was unable to adduce, either because it was not in possession of the facts or unable to obtain the testimony of the witnesses to prove those facts. In the case at bar we are not faced with such a situation. The petitioner, the respondent in the proceeding, claims to have full knowledge of these facts; claims to be in possession of the names of the witnesses who can produce such facts and documents and can testify thereto. Will the Circuit Court of Appeals say that the petitioner herein has not waived its right to introduce such evidence which it was in possession of and which it had full knowledge of? That is something that the court should not at this time pass upon.

Assuming that the Circuit Court of Appeals were to take the position that the refusal of the Commission to issue the *subpœnas duces tecum* was a "reasonable ground for the failure to adduce such evidence" would not your petitioner be met with the same argument by the Commission that the evidence sought to be introduced would not prove the facts claimed for them? Unless the documents are before the court and the testimony sought to be elicited from them and from the witnesses producing them are in the record—although unanswered and although not admitted because of objection let us say—the Circuit Court of Appeals will not have before it anything by which it can judge whether such testimony would have the virtues claimed for it.

The Circuit Court of Appeals is limited in its review only to a review of a *final order made by the Commission.*

Royal Baking Powder Co. v. *Federal Trade Com.*, Sup. Ct. Dist. of Col., June 21, 1927;
Milomine Co. v. *Fed. Trade Com.*, 254 Fed. 988;
Chamber of Commerce of Minn. et al. v. *Fed. Trade Com.*, 280 Fed. 45.

POINT IV.

The issuance of the subpœnas is a purely ministerial act.

The Federal Trade Commission acquires its jurisdiction from the Federal Trade Commission Act. Pursuant to Section 5 of such Act "unfair methods of competition in commerce are declared unlawful." By such section the Commission is empowered to "prevent persons, partnerships or corporations from using unfair methods of competition in commerce," and authorized to "issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of such complaint."

The Act provides that "*the person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint.*

Certain rules have been adopted by the Federal Trade Commission for proceedings before it. Nowhere in such Act nor in the rules is any provision made for the calling of witnesses by the respondent. The Act itself (Section 9) empowers the Commission to issue subpœnas and *subpœnas duces tecum* and to enforce compliance therewith. It provides:

> "The *Commission* shall have the power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

By the rules a method is provided whereby a respondent makes application to the Commission for the issuance of subpœnas and *subpœnas duces tecum* to the respondent's witnesses. Rule 7 provides as follows:

> "Subpœnas for the production of documentary evidence (unless directed to issue by the Commissioner upon his own motion) will issue only upon application in writing, which must be verified and must specify, as near as may be, the documents desired and the facts to be proved by them."

In the issuance of such subpœnas the Commission acts in a purely ministerial capacity. As a matter of fact, the Commission can exercise only administrative functions delegated to it by the Act and has no judicial power.

> *Federal Trade Comm.* v. *Eastman Kodak Co.*, 274 U. S. 619:

> "The proceeding before the Commission was instituted under Sect. 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of 'unfair methods of competition' in interstate and foreign commerce, and, if it finds that 'any unfair method of competition' is being

> used, to issue an order requiring the offender 'to cease and desist from using such method of competition.' *The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. National Harness, etc., Association* v. *Federal Trade Commission* (C. C. A.), 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48. It has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

The Federal Trade Commission Act specifically gives the right to respondent to appear and show cause and give evidence in its behalf as to why an order should not be made requiring it to cease and desist from certain practices. Before such order can be *enforced* the respondent has the right to have the entire proceeding reviewed by the Circuit Court of Appeals. Manifestly, a proper review cannot be had unless the respondent has had an opportunity to present its evidence or to offer the same.

If the Commission decides on the hearing that the testimony sought to be introduced by the respondent is incompetent or immaterial or irrelevant, the record shows this offer of proof and it will be before the Circuit Court in the proceedings to enforce compliance or to review the final order. If the Commission is permitted to close the door to a respondent's evidence by refusing to issue, on his behalf, subpœnas or *subpœnas duces tecum,* it is apparent that the respondent is deprived of his right and any order made by the Commission is without due process of law. What opportunity to present his case can there be to a respondent when the testimony of the hearings before the Commission is barren of the evidence which the witnesses sought and the documents attempted to be introduced would have shown? If the Commission was permitted the discretion of deciding whether or not to issue subpœnas it would be given the right to hold an *ex parte* hearing and make an order depriving a respondent of a valuable right or valuable property without an opportunity to either present his evidence or offer the same so that it appear on the record and be before the Circuit Court of Appeals when it reviews the order of the Commission.

The Commission in its return contends that the wording of Section 9 of the Act contemplates an exercise of discretionary power. The section gives to the Commission the power to require by subpœna the attendance and testimony of witnesses and "may require" the production of such documentary evidence.

Clearly that is not a limitation of power but a grant of power. Where the Act says that the Commission shall have the right and may require, the intent of such language is to give the Commission the absolute authority *as against a person subpœnaed. It does not pretend by the use of the word "may" to require the exercise of discretion.*

The refusal of the Commission to issue such *subpœnas duces tecum* amounts to a refusal to hear the petitioner herein, the respondent therein, and to give it the right—granted to it by law—to show cause. When a party to a proceeding is given the right to be heard that right carries with it the right to produce witnesses and documents in its defense. No distinction can be made *between the right to produce parties and witnesses.*

The Commission cannot, nor can the court, draw a line of demarcation between John Doe, who might be put upon the stand as a witness, and Richard Roe, who is a defendant or respondent in a proceeding. John Doe is as much of Richard Roe's case as is the latter. Papers in the possession of the former are as much a part of the case as those in possession of the latter. It is quite conceivable that a situation might arise where all of the evidence which a respondent could adduce in support of its defense might be in the possession of other people, and the refusal to require the attendance of those people and the production of documents in their possession would, of course, amount to a refusal to hear the respondent himself.

POINT V.

The production of the books and records sought to be subpœnaed cannot be defeated on the ground that they give to the petitioner an unreasonable insight into its competitors' business methods.

Although this contention is one that more properly comes from the mouths of the witnesses and is more properly in the form of objection on the hearing, the respondent in its return makes a point of it.

It does not require extended argument to show that such a contention is, to say the least, specious. Petitioner has requested that these witnesses be required to produce on the hearing literature which it sends through the mails in the solicitation of subscription circulation which contains certain warranties and representations. The Commission under another point contends that a great mass of such literature is sent by these witnesses. How the production and introduction into evidence of these circulars would give to the petitioner information which it now does not possess is hard to follow. If millions of these circulars are annually flooded through the mails there can be no secret concerning them and the methods which they disclose have become more or less publicly known.

Point VI.

The production of the records would in no way be a hardship upon the witnesses.

This also is an objection that comes more properly from the mouths of the witnesses. The Commission seems greatly concerned with the hardships which would be placed upon the witnesses if they were required to produce so many circulars. It was not nearly so considerate in the subpœna which it served upon this petitioner demanding in that instance the production of all of such circulars *from the year 1922 to date*. As a matter of fact the number of such circulars that each of such witnesses will be required to produce will not be more than about twenty each. There is no requirement that each and every circular be produced, but only one of each group mailed.

The giving of testimony and the production of documents is an incident of citizenship and is a requisite of proper and orderly legal procedure. A person who has in his possession documents which are relevant or material in any cause is subject to the requirement to produce them. A person strolling along the street and who sees an accident is quite probably considerably annoyed by having his time taken in a matter in which he has no interest, by being subpœnaed to appear and tell what he saw. Witnesses who have no interest in a result are always put to some inconvenience by being subpœnaed. That is no excuse and is no reason for their refusing to appear or for their not being required to appear. To be a witness is ofttimes more expensive than to be a party to a proceeding.

Point VII.

Mandamus is the proper remedy.

Although the records seem barren of any similar proceeding brought against the Federal Trade Commission, the remedy sought is neither unique nor new.

Similar proceedings have been brought against the Interstate Commerce Commission seeking parallel relief. In the case of *Kansas City Southern Railway against Interstate Commerce Commission,* 252 U. S. 178, a writ of mandamus was sought compelling the

Interstate Commerce Commission to investigate and fix the cost of condemnation of land and the damage to the relator by reason thereof. The relator in that case offered to adduce evidence showing that the valuation fixed by the Commissioner was erroneous. This evidence the Commission refused to hear. A suit was then brought to obtain a mandamus to compel the Commission to hear the proof and to act upon it under the statute. The Court of Appeals said:

> "The Commission in its answer, either stating or conceding the history of the case as we have recited it, and summarily reiterating the grounds for the refusal by the Commission to receive the proof or report concerning it, challenged the right to the relief sought. A demurrer to the answer as stating no defense was overruled by the trial court, which denied relief without opinion. In the Court of Appeals, two judges sitting, the judgment of the trial court was affirmed by a divided court, also without opinion, and the case is here on writ of error to review that judgment.
>
> It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the fact of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings

out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.

It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination,' and called for 'inadmissible assumptions,' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the *Minnesota Rate Cases*, 230 U. S. 352.

We are of opinion, however, that considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the Minnesota Rate Cases, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the Minnesota Rate ruling could furnish ground for refusing to carry out the commands of Congress, the

> cogency of which consideration is none the less manifest though it be borne in mind that the Minnesota Rate Cases were decided after the passage of the act in question.
>
> Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

A situation similar to the case at bar arose in *U. S. ex rel. St. Louis Southwestern Railway* v. *Interstate Commerce Commission*, 290 Fed. Reporter 264. There a writ of mandamus was sought directing the Interstate Commerce Commission to permit a carrier to inspect the papers and data used by the Commission in fixing the tentative value of the carrier's property and to permit the introduction of the same in evidence. The writ was refused because *it did not appear that any demand had been made on the Commission to produce at the hearing any specified paper or record which was refused by the Commission.*

In the instant case the issuance of the subpœnas *duces tecum* has been *demanded and refused.* Here the petitioner is being deprived of the *right* given to it by Section 5 of the Act to "show cause why an order should not be entered by the Commission requiring it to cease and desist from the violation of the law as charged in the complaint."

Conclusion.

We therefore respectfully submit that the order of the Supreme Court of the District of Columbia should be reversed and the case remanded to the lower court with instructions to set aside said order and grant the relief prayed for in the petition.

HARRY T. LORE,
HARVEY L. RABBITT,
JAMES H. SYKES,
Attorneys for Appellant.

Of Counsel:
JOSEPH SCHULTZ,
Of New York City,
New York.

FOR MR. JUSTICE VAN ORSDEL.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
NOV 18 1929
Henry W. Hodges
Clerk,

No. 5024

In the Court of Appeals of the District of Columbia

October Term, 1929

Macfadden Publications, Inc.
v.
Federal Trade Commission; Edgar A. McCulloch, Garland S. Ferguson, Jr., C. W. Hunt, William E. Humphrey, Charles H. March, Commissioners, Washington, D. C.

BRIEF FOR FEDERAL TRADE COMMISSION

ROBERT E. HEALY,
Chief Counsel, Federal Trade Commission,

BALDWIN B. BANE,
Attorneys for Respondents.

TABLE OF CONTENTS

Page
Statement of the case 1
Argument 11
I. The issuance of subpœnas duces tecum is a matter requiring the exercise of judgment and discretion on the part of the Commission 11
II. This is not a proceeding to compel the Commission to act but to direct and reverse its decision and discretion on a matter over which it has jurisdiction and upon which it has already acted 26
III. The statute provides a plain, adequate, and exclusive remedy for any error the Commission may have committed in the exercise of its judgment and discretion 32
IV. The subpœnas duces tecum prayed for by the petitioner would violate the Fourth Amendment to the Constitution of the United States 42
Conclusion 48

CASES CITED

Abilene & Southern R. R. Co. v. *Interstate Commerce Commission*, 8 Fed. (2d) 901 28, 39
Alaska Smokeless Coal Co. v. *Lane*, 250 U. S. 549 24, 27
American, etc., v. *Jacksonville, etc.*, 148 U. S. 372 28
Barnes v. *Lyons*, 187 Fed. 881 28
Bartlesville Zinc Co. v. *Interstate Commerce Commission*, 30 Fed. (2d) 479 31
Bayard v. *White*, 127 U. S. 246 12, 39
Board of Tax Appeals v. *McCandless*, 26 Fed. (2d) 1000 39
Boyd v. *United States*, 116 U. S. 616 13, 43
Carroll Electric Co. v. *McCarl*, 8 Fed. (2d) 910 39
Chamber of Commerce of Minneapolis v. *Federal Trade Commission*, 280 Fed. 45 28, 37, 41
City of Seattle v. *Pacific Telephone & Telegraph Co.*, 1 Fed. (2d) 327 12, 15
Cripple Creek & Colorado Springs R. R. Co. v. *Interstate Commerce Commission*, 11 Fed. (2d) 554 28, 39
Dancel v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753 13, 15, 38, 43, 44, 47
Decatur v. *Paulding*, 14 Pet. 497 25, 27, 29

Page

Donner Steel Co. v. *Interstate Commerce Commission*, 285 Fed. 955 ---- 24, 27, 40

Essgee Co. v. *United States*, 262 U. S. 151 ---- 43

Ewing v. *Fowler Car Co.*, 244 U. S. 1 ---- 26, 39

Ex parte American Steel Barrel Co., 230 U. S. 35 ---- 40

Ex parte First National Bank, 228 U. S. 516 ---- 28

Ex parte Martha Bradstreet, 33 U. S. 586 ---- 28

Ex parte Newman, 81 U. S. 152 ---- 39

Ex parte Riddle, 255 U. S. 450 ---- 39

Ex parte Skinner & Eddy Corp., 265 U. S. 86 ---- 15

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298 ---- 13, 39, 43, 45, 47

Federal Trade Commission v. *Armour & Co.*, Docket 351 ---- 35

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 ---- 38

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568 ---- 35

Federal Trade Commission v. *Gratz*, 253 U. S. 421 ---- 19

Federal Trade Commission v. *Winsted Hosiery Co.*, Docket 214 ---- 35

Federal Trade Commission v. *Winsted Hosiery Co.*, 258 U. S. 483 ---- 16, 18

Frankel v. *Woodrough, Dist. Judge*, 7 Fed. (2d) 796 ---- 12, 28

Garfield v. *Turner*, 31 App. D. C. 332 ---- 12

Hale v. *Henkel*, 201 U. S. 43 ---- 13, 38, 43, 47

Henderson Tire & Rubber Co. v. *Reeves*, 14 Fed. (2d) 903 ---- 39

Hills Bros. v. *Federal Trade Commission*, 9 Fed. (2d) 481 ---- 16, 17, 21

Hitchcock v. *Bigboy*, 22 App. D. C. 275 ---- 25

Hurst & Sons v. *Federal Trade Commission*, 268 Fed. 874 ---- 28, 41

In re Gilbough, 13 Fed. (2d) 462 ---- 40

In re Huguley Manufacturing Co., 184 U. S. 297 ---- 39

In re Key, 189 U. S. 84 ---- 12, 15, 39

In re Press Printers & Publishers, 12 Fed. (2d) 660 ---- 25, 29, 39, 40

International Contracting Co. v. *Lamont*, 155 U. S. 303 ---- 12

Interstate Commerce Commission v. *Baird*, 194 U. S. 25 ---- 14, 15, 39, 44

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447 ---- 39, 43

Interstate Commerce Commission 1. Harriman, 211 U. S. 407 ---- 13, 43

Interstate Commerce Commission v. *Waste Merchants Association*, 260 U. S. 32 ---- 26, 40

Kansas City Southern R. R. Co. v. *Interstate Commerce Commission*, 6 Fed. (2d) 692 ---- 27, 39

Kansas City Southern R. R. Co. v. *Interstate Commerce Commission*, 252 U. S. 178 ---- 30

Katsch v. *Rafferty*, 12 Fed. (2d) 450 ---- 12, 15, 27, 39

Kendall v. *United States*, 12 Pet. 524 ---- 12

Lane v. *Hoglund*, 244 U. S. 174 ---- 25

Lane v. *Mickadiet*, 241 U. S. 201 ---- 26

Lapique v. *Dist. Ct.*, 8 Fed. (2d) 869 ---- 39

Lincoln Highway Assn. v. *Ewing*, 42 App. D. C. 508 ---- 13

Page

Marbury v. *Madison*, 5 U. S. 137 — 25
Margulies & Sons v. *McCarl*, 10 Fed. (2d) 1012 — 25
Maryland v. *Soper*, 270 U. S. 9 — 41
McCabe v. *Work*, 2 Fed. (2d) 941 — 40
McCarty v. *United States*, 19 Fed. (2d) 462 — 12
Miller v. *Mutual Reserve Fund Life Assn.*, 139 Fed. 864 — 38, 43
Moore v. *Greenhow*, 114 U. S. 338 — 39
Murray v. *Louisiana*, 163 U. S. 101 — 38, 43
Ness v. Fisher, 223 U. S. 683 — 26
Norris v. *Forbes*, 278 Fed. 331 — 39
Nulomoline Co. v. *Federal Trade Commission*, 254 Fed. 988 — 41
Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316 — 26, 28, 40
Royal Baking Powder Co. v. *Federal Trade Commission*, 32 Fed. (2d) 966 — 25, 36, 41, 42
Royal Baking Powder Co. v. *Federal Trade Commission*, Sup. Ct. of District of Columbia, decided May 17, 1929 — 37, 41
Schuricht v. *McNutt*, 26 Fed. (2d) 388 — 15, 16, 25, 42
Sousa v. *Warner*, 36 W. L. R. 204 — 13
St. Louis Southwestern Ry. v. *Interstate Commerce Commission*, 290 Fed. 264 — 23, 31
Stowell v. *Deming*, 19 Fed. (2d) 697 — 12
Symons v. *Robertson*, 30 Fed. (2d) 566 — 25, 41, 42
Tidal Osage Oil Co. v. *West*, 30 Fed. (2d) 737 — 25, 31, 42
Tucker v. *Peiler*, 297 Fed. 570 — 15, 25, 28, 42
United States v. *Burr*, 25 Fed. Cas. No. 14692d — 13, 15
United States v. *Hunter*, 15 Fed. 712 — 13, 15, 38, 42
United States v. *St. Louis Terminal R. Assn.*, 148 Fed. 486 — 15
United States v. *Terminal R. Assn.*, 154 Fed. 268 — 13, 15, 38, 42, 43, 47
Vacuum Cleaner Co. v. *Platt*, 196 Fed. 398 — 15, 16, 17, 25, 38, 42
Weeks v. *United States*, 232 U. S. 383 — 13, 39, 47
Wilson v. *United States*, 221 U. S. 361 — 38, 43
Work v. *Rives*, 267 U. S. 175 — 12, 26, 27, 40, 42

OTHER AUTHORITIES CITED

26 Cyc., p. 449, note 75 — 12
Federal Trade Commission Act — 10, 11, 32
Interstate Commerce Commission Act — 13
Rev. Stats. 724, 863, 867, 868, 869 — 13

In the Court of Appeals of the District of Columbia

October Term, 1929

No. 5024

Macfadden Publications, Inc.
v.
Federal Trade Commission; Edgar A. McCulloch, Garland S. Ferguson, jr., C. W. Hunt, William E. Humphrey, Charles H. March, Commissioners, Washington, D. C.

BRIEF FOR FEDERAL TRADE COMMISSION

STATEMENT OF THE CASE

On November 24, 1928, the Federal Trade Commission issued a complaint under Section 5 of the Federal Trade Commission Act against Macfadden Publications, Inc., charging it with making certain false and misleading statements in the literature used by it in its efforts to obtain subscription circulation to its publications, True Story, True Romance, True Experiences, Dance Magazine, Physicul Culture, True Strange Stories and others. R. 7-10.) Macfadden Publications, Inc., filed an answer to the complaint on December 22, 1928.

(R. 10, 11.) Testimony in support of the charges of the complaint was taken before an examiner of the Federal Trade Commission in New York on February 26 and 28, and March 1, 1929, and the Commission's case closed. Macfadden Publications, Inc. requested that it be given until March 18th to begin the introduction of its testimony in opposition to the charges of the complaint in order that it might make application to the Commission for certain subpœnas and subpœnas duces tecum.

On March 4, 1929, it made application for subpœnas duces tecum to eight publishers and distributors "requiring them and each of them to bring with them copies of any and all literature used by their respective companies from the year 1922 to date, in the solicitation of subscription circulation to the publications and periodicals published by each of such companies." At the same time, it applied for five subpœnas ad testificandum which were immediately issued and served. (R. 31, 32.) With reference to the subpœnas duces tecum requested, the Chief Counsel of the Commission wrote counsel for petitioner, as follows:

MARCH 9, 1929.

JOSEPH SCHULTZ, Esq.,
522 Fifth Avenue,
New York, N. Y.

In re Docket 1549, MacFadden Publications, Inc.

DEAR SIR: Your request under date of March 4, 1929, for 6 subpœnas duces tecum has been referred to me, and I am required to make a recommendation to the Commission as to your request. I find some difficulties in the way which I wish you to consider. First, let me say I do not wish to hinder or embarrass you in any way in presenting your defense or raising such questions as you think ought to be presented either to the Commission or to the courts. It is proper and probably necessary that the Commission issue subpœnas for witnesses needed by respondents. There seems to be in the act, however, no provision for action by respondents to compel obedience to the subpœnas which the Commission issues. Such an application must be made, I judge, in case of disobedience by the Commission. It would not be fair to respondents to issue subpœnas on their behalf which the Commission would be unwilling to attempt to enforce by applications to the courts. Furthermore, in trying to decide what to do, analogies by reference to equity practice may be helpful.

It is claimed that in the Federal Equity Courts subpœnas duces tecum do not issue except upon the order of the court based on representations of facts which show reasonable possibility that papers demanded are material, relevant, and competent. No such showing appears in your application. Furthermore, is there reasonable ground to believe that all the documents you demand of these witnesses are evidence? Or do you

> wish to examine them to discover evidence? If the latter, do you not run counter to the 4th Amendment and the decisions under it? Are you willing to tell me whether these prospective witnesses are apt to obey or to refuse? Also, if your purpose is to attempt to prove that certain competitors are using the same or similar methods as those used by your client and alleged to be unfair, would it not be best to have the question ruled on in one typical instance before bringing in what may possibly amount to a very large volume of papers?
>
> It will be helpful to me if you will indicate your views on all these points, and if you will also consider whether you can improve your application.
>
> The other subpœnas will be issued to-day.
>
> Very truly yours,
>
> ROBT. E. HEALY,
> *Chief Counsel.*
>
> (R. 32, 33.)

The petitioner's counsel afterwards came to Washington and had conferences with the Chief Counsel of the Commission, and at such conferences informed him that he had seen the parties for whom the subpœnas duces tecum were requested, and that there would be no objection on their part to the production of the documents, that the documents would be willingly produced. (R. 20.) On March 14, 1929, he wrote the Chief Counsel of the Commission, as follows:

In the matter of MacFadden Publications, Inc.

Docket 1549

MARCH 14, 1929.

FEDERAL TRADE COMMISSION,
Washington, D. C.

Attention Hon. Robert E. Healy.

DEAR JUDGE HEALY: This is to acknowledge receipt of your letter of March 12th in the above matter, advising me of the postponement of the hearing from March 18th to March 28th, 1929.

In response to your prior communication of March 9th, permit me to say that I am quite confident that, if the Commission issues the subpœnas duces tecum requested by me and referred to in your said letter, none of the corporations and individuals whose attendance will be so required will in any way resist such process.

In regard to the proof which I intend to elicit from such witnesses and from the documents to be produced by them, I assure you it is my purpose and intention to keep the record within reasonable bounds, and if possible, to offer only such papers as may be necessary to give to the Commission and to the courts, if necessary, proof of material and relevant facts as I view such facts to be relevant and material.

I must, in order to properly protect my client's interest, make an offer of proof and ask for an admission into the evidence of such documents as the respondent deems relevant to its defense, and if such documents or proof be excluded by the trial examiner to mark the same for identification so that they may be subsequently before a reviewing tribunal.

Very truly yours,

JOSEPH SCHULTZ.

JS:RR.
(R. 34.)

Relying upon these representations of petitioner's counsel, the subpœnas duces tecum were issued and served as requested. (R. 3, 35.)

Shortly after the subpœnas duces tecum were issued and served, all of those upon whom they had been served, except one, filed with the Commission motions to vacate such subpœnas. (R. 38, 50.) The Commission, upon learning from such motions that there was objection to the production of such documents and believing that said subpœnas were unenforceable, vacated the duces tecum clauses of them and petitioner's counsel was notified of such action (R. 3, 35), after which he wrote the following letter to the Commission's Chief Counsel:

MARCH 26, 1929.

Hon. ROBT. E. HEALY,
Federal Trade Commission,
Washington, D. C.

Re: MacFadden Publications, Inc., Docket 1549

DEAR JUDGE HEALY: I have this day telegraphed you as follows:

"Regarding MacFadden publications docket number fifteen forty-nine am advised that witnesses subpœnaed are moving to vacate same cannot proceed with defense on twenty-eighth Please advise me regarding adjournment at least one week pending determination of application to vacate subpœnas and my determination regarding proceeding to compel obedience or in alternative my decision to stipulate with Commission regarding practices complained of."

I wrote you after my talk with you concerning the issuance of subpœnas and advised you that it was my understanding that the witnesses for whom subpœnas were being requested were not hostile and would gladly obey such process and produce the documents called for.

Much to my surprise this morning for the first time I learned that counsel for these witnesses had advised them to make application to vacate such subpœnas. I suspect what motivates these witnesses to such desire. Accordingly it becomes necessary for me to obtain an adjournment to determine whether an application should be made to enforce obedience to such subpœnas or whether my client having been so duly advised cannot and should not take a different position in the premises than it has heretofore.

If an adjournment is so granted it is my desire to meet you and to discuss with you the further conduct of this matter. Such an appointment at your convenience would be appreciated.

> Please be good enough to advise me by telegram what disposition will be made of my request for an adjournment. I am sure you appreciate my circumstances and how utterly impossible it is for me, in view of what has transpired, to proceed in an orderly fashion. I have built up my case on the theory that these witnesses would give certain testimony pursuant to my understanding that they would produce their documents and comply with the subpœna. I had, as a matter of fact, been given the impression that these witnesses would so appear and so produce their documents whether subpœnaed or not.
>
> Thanking you for your courtesy,
> Sincerely yours,
> Joseph Schultz.
>
> JS: RR.
> (R. 35, 36)

On April 4, 1929, petitioner, through its counsel, filed with the Commission another application for subpœnas duces tecum to the same publishers to which it had requested such subpœnas in its application of March 4, 1929, and requested that seven of them

> be required to produce any and all copies of letters, circulars, and literature used by each of such persons, firms, or corporation so subpœnaed in the solicitation of subscriptions to magazines or periodicals published or distributed by each of such persons, firms, or corporations, used during the years 1924 to

> date, showing particularly that such letters, circulars, and literature contain offers to prospective subscribers, which said offer was being made to a special or limited group for a limited period and/or alleging that the price offered in such letter, circular, and literature for such subscription is less than the regular, usual, and ordinary price of such subscription, together with any and all copies of reports containing circulation figures made semiannually by each such persons, firms, or corporations to the Audit Bureau of Circulation during the years hereinbefore specified

and to the other party, Franklin Square Agency, it requested a subpœna duces tecum

> requiring such person, firm, or corporation to produce any and all circulars, literature, or catalogues published or distributed by such person, firm, or corporation during the years 1924 to date in which offers are contained and prices are given for a subscription for one, two, and more years to any of the publications published by the Respondent. (R. 13, 14.)

Believing that such subpœnas duces tecum would be unenforceable, the Commission on April 20, 1929, denied petitioner's application. Thereafter petitioner filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Commission to issue said subpœnas duces tecum. The Commission duly filed its answer and return and after hearing, on May 17, 1929, before Hon. Wendell P. Stafford, Justice, upon the petition, rule to show cause, answer and return, and general demurrer by petitioner and argument by counsel for petitioner, the demurrer was overruled, the rule to show cause discharged, and the petition denied. Whereupon petitioner noted an appeal. (R. 50.)

This case involves only the question of the authority of the Court by mandamus to compel the Federal Trade Commission to issue the subpœnas duces tecum demanded by petitioner. Subpœnas ad testificandum are in no way involved. All such subpœnas requested by petitioner were issued and served, and such subpœnas were issued and served upon those to whom subpœnas duces tecum were refused. (R. 21, 33.)

The powers and duties of the Federal Trade Commission so far as they relate to this case, are only such as are created and defined by Sections 5 and 9 of the Federal Trade Commission Act, to wit: "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914. The only authority of the Commission to issue subpœnas duces tecum is that given by Section 9, which provides:

> and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

and further:

> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna, the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

ARGUMENT

I

The issuance of subpœnas duces tecum is a matter requiring the exercise of judgment and discretion on the part of the Commission

It is at once manifest that the Commission is nowhere expressly directed to issue subpœnas duces tecum at the request or upon the demand of a respondent before it. There is no clear, indisputable, and plainly defined legal duty upon the Commission to issue the subpœnas duces tecum demanded by petitioner.

The statute empowers the Commission only to enforce such subpœnas. The Commission should not, therefore, issue subpœnas duces tecum that it does not believe can be enforced.

A portion of defendants' answer and return herein constitutes a demurrer to the plaintiff's petition. Under the established practice the return or answer to a petition for a writ of mandamus may be in the nature of a demurrer. (26 Cyc. p. 449, note 75.) A petition for a writ of mandamus to be good as against a demurrer must allege facts from which it is manifest that the defendants owe to plaintiff a "clear and indisputable" duty to do the very act to be commanded, as set forth in the mandatory clause in the prayer for relief. The right to the relief must be "so clear as not to admit of reasonable doubt or controversy." The duty must be "clear and peremptorily enjoined by law." (*Bayard* v. *White,* 127 U. S. 246, 250; *Frankel* v. *Woodrough, District Judge,* 7 Fed. (2d) 796, 797; *Katsch* v. *Rafferty*, 12 Fed. (2d) 450; *In re Key*, 189 U. S. 84; *International Contracting Co.* v. *Lamont,* 155 U. S. 303, 308; *City of Seattle* v. *Pacific Telephone and Telegraph Co.,* 1 Fed. (2d) 327, 329; *McCarty* v. *United States,* 19 Fed. (2d) 462; *Stowell* v. *Deming,* 19 Fed. (2d) 697, 698.) The writ of mandamus can be "used only to compel a duty that is purely ministerial, where there is only one thing that can be done." (*Kendall* v. *United States,* 12 Peters 524; *Work* v. *Rives,* 267 U. S. 175, 177; *Stowell* v. *Deming,* 19 Fed. (2d) 697, 698.)

Before mandamus will issue it must appear that the defendants have the power and authority to perform the act sought to be enforced. (*Garfield* v. *Turner,* 31 App. D. C. 332.) If there is any doubt as to the legal authority or duty of the defendants to perform the act to be enforced, its performance will not be required by mandamus. (*Sousa* v. *Warner,* 36 W. L. R. 204; *Lincoln Highway Assn.* v. *Ewing,* 42 App. D. C. 508.)

The statute gives the Commission authority to issue subpœnas duces tecum only for documents relevant to the charges of the complaint. That the documents to be produced by subpœna duces tecum must be relevant is a requirement of all the statutes relating to such subpœnas. (Rev. Stats. 724, 863, 867, 868, 869, Interstate Commerce Commission Act, etc.) The Federal Trade Commission Act is not peculiar in this respect.

It has always been the rule in the Federal Courts, at least since the case against Aaron Burr, that subpœnas duces tecum issue only upon a showing to the satisfaction of the court, that it may reasonably be expected that the documents to be produced would be relevant and material evidence for those wanting them, that the evidence which the books or papers asked for would furnish is material and relevant to the issues in the case. (*United States* v. *Burr,* 25 Fed. Cas. No. 14692d; *Dancel* v. *Goodyear,* 128 Fed. 753; *United States* v. *Hunter,* 15 Fed. 712; *United States* v. *Terminal R. Assn.,* 154 Fed. 268; *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298; *Hale* v. *Henkel,* 201 U. S. 43; *Boyd* v. *United States,* 116 U. S. 616; *Interstate Commerce Commission* v. *Harriman,* 211 U. S. 407; *Weeks* v. *United States,* 232 U. S. 383.)

In *United States* v. *Terminal Railroad Association,* 154 Fed. 268, 272, the Court, after an exhaustive review of the authorities and in a well-reasoned opinion, said:

> It is for the Court to determine from the facts set out in the petition, or perhaps other proofs, whether the documents, when produced, will be relevant and material. In my opinion, in order to entitle a party to a subpœna duces tecum requiring a witness not a party to the action to produce books and documents in his possession, it is not sufficient to allege merely that the documents required are material or relevant to the issues; but the facts which will show the court that they are relevant and material must be set out, in order to enable the court to determine that fact. Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them has been aptly denominated a "fishing examination," and is always regarded as oppressive, and as such denied.

In *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 44, the Court said:

> Relevancy is that quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit.

It depends upon its legitimate tendency to establish a controverted fact.

Consequently, it has always been held that subpœnas duces tecum issue only in the discretion of the Court and an application for such subpœnas is addressed to the discretion of the Court. (*United States* v. *Burr,* 25 Fed. Cas. No. 14692d; *Vacuum Cleaner Co.* v. *Platt,* 196 Fed. 398; *Tucker* v. *Peiler,* 297 Fed. 570; *Schuricht* v. *McNutt,* 26 Fed. (2) 388; *United States* v. *Hunter,* 15 Fed. 712; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25; *In re Key,* 189 U. S. 84; *United States* v. *St. Louis Terminal R. Assn.,* 148 Fed. 486; *Dancel* v. *Goodyear Shoe Machinery Co.,* 128 Fed. 753; *United States* v. *Terminal R. Assn.,* 154 Fed. 268; *City of Seattle* v. *Pacific T. and T. Co.,* 1 Fed. (2d) 327; *Katsch* v. *Rafferty,* 12 Fed. (2d) 450; *Ex Parte Skinner & Eddy Corp.,* 265 U. S. 86.) It was certainly not intended to give the Federal Trade Commission wider powers in the issuance of such subpœnas than the Courts have or to authorize the Commission to deliberately do an act which it believes to be beyond its authority and in violation of law.

The gravamen of the charge in the complaint against petitioner is that the representations upon which it seeks to secure subscriptions to its publications are false and misleading. No charge is made with reference to the practices of these competitors to which petitioner seeks subpœnas duces tecum. The documents for which petitioner demands subpœnas duces tecum are not confined to documents showing similar practices, if such there be, on the part of its competitors, but include all documents which would show that any of those to whom such subpœnas might be issued has made or makes representations similar to those petitioner is charged with falsely making, though such representations by its competitors be wholly true and in no way contain any false or misleading statement. (R. 13, 14.)

The request upon the Franklin Square Agency for its literature relating to offers for subscriptions to the publications of petitioner is clearly irrelevant and immaterial, since the issues raised by the complaint relate only to the way in which petitioner has sold its publications, and not to the way its publications may be sold by some one else, and such party should not be required to disclose to petitioner how, and at what price, it sells the magazines published and distributed by petitioner.

There is nothing in the record to show that any of the papers demanded by petitioner would tend to prove the immaterial facts which petitioner seeks or says it seeks to show by them, even if they were produced. The petition herein is wholly insufficient, for it not only fails to show that the documents for which subpœnas duces tecum are demanded are relevant or material to the issues in the proceeding before the Commission, but it clearly appears from such petition that the documents are irrelevant and immaterial. (*Vacuum Cleaner Co.* v. *Platt,* 196 Fed. 398; *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483; *Hills Bros.* v. *Federal Trade Commission,* 9 Fed. (2d) 481; *Schuricht* v. *McNutt,* 26 Fed. (2d) 388.)

In *Hills Bros.* v. *Federal Trade Commission* (*supra*) Hills Bros., the respondent before the Commission, offered proof to establish that a competitor and others used methods similar or identical to those employed by it, and of which the Commission complained. The objection to this class of evidence was sustained and such ruling was assigned as error in the Circuit Court of Appeals. Of this the Court said at page 485:

> If the concerns in question did nothing more than the petitioner has done, according to its own contention, they did not violate the law, nor has the petitioner violated the law, for reasons hereinafter stated. If, on the other hand, the petitioner has violated the law, it would avail nothing to prove that others were equally guilty. Proof of the methods employed by others would be of little avail in any event, unless the methods employed were similar, and in order to determine the similarity of methods the commission would be compelled to hear and try many cases, instead of only one. There was no error in the rulings complained of.

And the Court sustained the order to cease and desist of the Commission.

In *Vacuum Cleaner Co.* v. *Platt* (*supra*) a petition for mandamus was filed to compel the District Judge to issue a subpœna duces tecum in a patent infringement suit for papers which it was claimed would show an infringement of the patent by others. The Court said at page 399:

> The document called for in this case could have no possible relevancy upon the issues as to whether the patent was valid and infringed. The petition states this was the reason that Judge Platt refused to let it go. The whole purpose of asking for the agreement was to obtain proof which might be used in subsequent actions against other parties, members of the association, to show that they would be bound by a decree, if one was obtained.

And at page 400:

> It is not to be used for the correction of errors in respect to matters within the discretion of the lower court. Our jurisdiction of this case is by appeal, and will in no way be affected by Judge Platt's refusal to issue the subpœna duces tecum, even if erroneous.

The statement of petitioner on page 7 of its brief that: "Repeatedly have the courts held that the fact that competitors are using methods similar to the ones complained of is material, relevant, and competent" is wholly unfounded. It has never been so held. None of the cases cited by petitioner on pages 7 and 8 of its brief supports such a statement. The question of the relevancy, materiality, or competency of the fact that competitors were using the same or similar practices was not considered in any of these cases. In *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, it was stipulated that the methods complained of had been general and universal customs and practices in the industry for twenty years and were well understood in the trade. For this reason the lower court held the practices not unfair methods of competition. But in spite of this use of the methods by competitors, the Supreme Court held the practices to be unfair methods of competition. The case is against petitioner. Petitioner purports, on page 9 of its brief, to quote from the Winsted Hosiery Co. decision in the Supreme Court, as it did in its brief in the lower court. There is no such statement in the Supreme Court decision in the Winsted case as this purported to be quoted therefrom by petitioner. This is a plain misquotation of the opinion.

It has never been held as is stated by petitioner on page 6 of its brief "that the Commission's jurisdiction is limited solely to a case where a person, firm, or corporation is engaged in business methods which unfairly compete with his competitors and thus threatens to result in a monopoly in favor of that person and to the public injury." Nor is its inquiry, as petitioner claims, "properly directed only into practices which—although perfectly legal—might grant to one an unfair advantage over his competitors," and petitioner cites no cases to support such statements. Probably the most authoritative definition of "unfair methods of competition" which the Commission is "empowered and directed to prevent" is in *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427: "They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or to create monopoly." And in the vast majority of the cases in which the Commission has issued orders to cease and desist the practice condemned has been characterized by deception, bad faith, fraud, or oppression, but tended in no way to create or result in monopoly.

Petitioner on page 7 of its brief claims that "it should be permitted to prove by its competitors that the business of the petitioner comprises but a small, negligible fraction of the entire field and that a substantial portion of the public is not affected." This claim of what it is intended to prove by the documents was not set out in the application for the subpœnas duces tecum. (R. 12.) The documents for which petitioner requests subpœnas duces tecum could not and would not tend in any way to prove this averment. The competitors for which petitioner demands subpœnas duces tecum have been served with subpœnas ad testificandum (R. 21) and petitioner may ask them any competent, relevant, and material questions that it desires. If petitioner cites the cases on pages 7 and 8 of its brief in support of this statement, they are no more in point than they were for the propositions for which they were cited in petitioner's application for the subpœnas, that is, "that the testimony so sought to be adduced is material, competent, and relevant and has been so held to be material and relevant." (R. 14.)

On page 9 of its brief, petitioner, as it did in its brief before the lower court, incorrectly states and quotes from the opinion in *Hills Bros.* v. *Federal Trade Commission,* 9 Fed. (2d) 481, saying: "In that proceeding a complaint was made by the Commission of a system of merchandising employed by the respondent therein, a coffee importer, in connection with price fixing and the maintaining of a minimum resale price. The respondents therein offered to prove that *publishers* throughout the country were selling *magazines* at fixed prices in other states under agreements to maintain these prices and refused to sell to dealers who had not maintained the prices agreed. Manifestly, proof of the fact that *magazine publishers* were engaged in price fixing was in no way competent in a proceeding brought against coffee importers. That is exactly what the court held and nothing more." The decision clearly shows that the evidence which the respondent offered and which the Commission refused, which refusal was sustained by the Court, included evidence of the practices of a competitor as well as evidence of the practices of publishers. Hills Brothers with its principal place of business in San Francisco, California, was engaged in the business of importing coffee and selling the same throughout the United States. The court said at page 484:

> The petitioner also offered to prove that a concern in Los Angeles was selling coffee, and that publishers throughout the country were selling magazines, at fixed prices in other states, under agreements to maintain these prices, and refused to sell to dealers who would not maintain the prices agreed upon. An objection to this class of testimony was sustained, and the ruling is assigned as error.

The quotation from the case at the bottom of page 9 of petitioner's brief is merely a part of one sentence from the opinion. Petitioner ends its quotation at a comma, and the balance of the sentence would and does clearly contradict the impression given by that quoted by petitioner as is shown by the quotation from this case, which contains the extract quoted by petitioner, on page 17 above. Petitioner's is a very misleading statement of this case.

Aside from the relevancy and materiality of the facts which petitioner claims it seeks to prove through the documents which it desires to have produced, the documents could in no way tend to prove many of the facts petitioner claims it desires to prove by them. The fact that eight other publishers also use the methods complained of, if such be true, would not establish such methods as general customs in the trade, or that such practices have never been regarded as opposed to good morals, or tend to prove that the public is not deceived thereby, nor are the documents necessary to prove, nor would they tend to prove, as petitioner, on page 11 of its brief, claim it desires to prove by them, that the reports to the Audit Bureau of Circulation "do not pretend to be what the Commission claims them to be and that they are not so understood by the publishing industry in general."

Even if the documents demanded were relevant and material, still the Commission must use its judgment and discretion and not allow a respondent before it to use its processes oppressively, or where unnecessary, to obtain documents which would be merely cumulative and tend only to encumber the record. A respondent before the Commission would not be entitled to subpœnas duces tecum, in many instances, for all relevant and material documents.

In *St. Louis Southwestern Railroad Company* v. *Interstate Commerce Commission,* 290 Fed. 264, 269, affirmed 264 U. S. 64, this Court held the action of the Commission to be within a possible construction of the Statute, and that, therefore, its action could not be reviewed upon petition for mandamus for the purpose of determining whether or not it did err in such construction. This Court said:

> * * * the decisions of the Supreme Court of the United States referred to, and many others which might be cited, as well as decisions of this court, make it very clear

> that we can not control by mandamus the discretion vested in the Commission by Congress.

And quoted from the decision in *Hall* v. *Paine,* 254 U. S. 343, 347:

> It is manifest from this statement that the petition presents a controversy over the true construction of the act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act. * * * He (the Secretary) could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus.

And in *Alaska Smokeless Coal Company* v. *Lane,* 250 U. S. 549, 555, the Court said:

> But where there is discretion, as we think there is in this case, even though its conclusion be disputable, it is impregnable to mandamus.

In *Donner Steel Company* v. *Interstate Commerce Commission,* 285 Fed. 955, 958, this Court held that an erroneous decision or conclusion of the Interstate Commerce Commission in a matter over which it has jurisdiction, "if evidence has been excluded that should have been admitted, or a wrong conclusion of fact has been reached and errors of law occur, it results from a mistaken judgment," can not be reiewed by mandamus but only by proceeding in error.

Federal Courts are reluctant to sustain or award a writ of mandamus against any executive officer or department and there must be no room for discretion or judgment, but on the contrary, there must be a plain, legal duty before they will award such a writ. (*Lane* v. *Hoglund,* 244 U. S. 174, 181; *Hitchcock* v. *Bigboy,* 22 App. D. C. 275.)

Clearly the Commission must, and by the Statute is required to, exercise its judgment and discretion in the issuance of subpœnas duces tecum in proceedings before it. It is only authorized to issue such subpœnas for the production of documents "relating to any matter under investigation." It must, therefore, decide whether the documents demanded relate to the matter under investigation and such decisions are not reviewable in a proceeding for a writ of mandamus. (*Marbury* v. *Madison,* 5 U. S. 137; *Decatur* v. *Paulding,* 14 Pet. 497; *Margulies & Sons* v. *McCarl*, 10 Fed. (2d) 1012, certiorari denied; *Vacuum Cleaner Co.* v. *Platt,* 196 Fed. 398; *Tucker* v. *Peiler,* 297 Fed. 570; *In re Press Printers & Publishers,* 12 Fed. (2d) 660, 664; *Schuricht* v. *McNutt*, 26 Fed. (2d) 388; *Symons* v. *Robertson,* 30 Fed. (2d) 566; *Tidal Osage Oil Co.* v. *West*, 30 Fed. (2d) 737; *Royal Baking Powder Co.*

v. *Federal Trade Commission,* 32 Fed. (2d) 966; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324; *Ness* v. *Fisher,* 223 U. S. 683, 691; *Lane* v. *Mickadiet,* 241 U. S. 201; *Ewing* v. *Fowler Car Co.,* 244 U. S. 1; *Interstate Commerce Commission* v. *Members of Waste Merchants Assn.,* 260 U. S. 32, 34; *Work* v. *Rives,* 267 U. S. 175, 177.)

II

This is not a proceeding to compel the Commission to act but to direct and reverse its decision and discretion on a matter over which it has jurisdiction and upon which it has already acted

While mandamus may lie to compel an official or a court to proceed in or decide a matter committed to it, it will not lie to compel a particular decision. The mandate asked for in this case is not that the Commission act but that it take certain action. It is not alleged that the defendants are refusing to assume and exercise jurisdiction or have refused to act in the premises.

The Commission has not refused to act upon petitioner's application for subpœnas duces tecum. It, after full consideration, refused to issue the subpœnas duces tecum which petitioner demands. Petitioner now seeks to have that action of the Commission reversed and have this Court by writ of mandamus direct the Commission to issue such subpœnas. It is well settled that mandamus will not lie for such purpose. Mandamus is a remedy for refusal to act, not for action alleged to be erroneous.

Where the plaintiff demands a particular action and the officer takes action, but not that demanded, his action is not a refusal to act within the meaning of the rule and does not lay the foundation for a petition for a writ of mandamus, even though such action be erroneous. (*Work* v. *Rives,* 267 U. S. 175, 184; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549.)

The Federal Trade Commission under the act has authority to decide upon the issuance of the subpœnas duces tecum, and whether it decided right or wrong is not the question here; such question can not be reviewed by mandamus. The writ of mandamus can not be used to set aside a decision or order, though erroneous, and substitute another therefor. (*Decatur* v. *Paulding,* 14 Peters, 497; *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 6 Fed. (2d) 692, certiorari denied, 269 U. S. 570; *Donner Steel Co.* v. *Interstate Commerce Commission,* 285 Fed. 955; *Work* v. *Rives,* 267 U. S. 175, 177, 184; *Katsch* v. *Rafferty,* 12 Fed. (2d) 450.)

The rule against reversal of orders made in the exercise of discretion or judgment applies to all orders—interlocutory or final. The rule is almost universal that mandamus will not lie to correct or review interlocutory proceedings, even though no immediate appeal is given; such proceedings being reviewable on appeal or error from final judgment or decree. Such proceedings involve judgment and discretion and can not in any event be corrected by mandamus; and the delay, vexation, and expense attending interference in interlocutory matters would be burdensome. "Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause." (*American etc.* v. *Jacksonville etc.,* 148 U. S. 372, 379; *Ex parte Martha Bradstreet,* 33 U. S. 586, 590; *Tucker* v. *Peiler,* 297 Fed. 570, certiorari denied 48 Sup. Ct. 461; *Abilene & S. R. R. Co.* v. *Interstate Commerce Commission,* 8 Fed. (2d) 901, 902, certiorari denied, 270 U. S. 650; *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed., 45; *Hurst & Sons* v. *Federal Trade Commission,* 268 Fed. 874; *Ex parte First National Bank,* 228 U. S. 516; *Barnes* v. *Lyons,* 187 Fed. 881; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Frankel* v. *Woodrough, Dist. Judge,* 7 Fed. (2d) 796, 797; *Cripple Creek & Colorado Springs R. R. Co.* v. *Interstate Commerce Commission,* 11 Fed. (2d) 554.)

In this last case, a petition for a writ of mandamus, this court, at page 556 said:

> The Commission has construed the statute and applied its construction to the facts, and, however erroneous, its conclusions, under recent decisions of the Supreme Court, are beyond our jurisdiction to correct in this proceeding.

Certiorari was denied.

In re Press Printers & Publishers, 12 Fed. (2d) 660, 664 the court said:

> Inherently, the most important limitation on this jurisdiction is that the writ of mandamus is not a proper remedy to control or direct the decisions of inferior courts in matters wherein they have judicial cognizance and discretion. In other words, so far as the writ affects the action of inferior courts, its use is not to be extended to compel the rendition of a particular judgment, in accordance with the views of a higher court. *Kimberlin* v. *Commission to Five Civilized Tribes,* 104 Fed. 653; *Minnesota Moline Plow Co.* v. *Dowagiac Manufacturing Company,* 126 Fed. 746.

If such interlocutory orders or rulings of the Commission could be reviewed by mandamus, the whole proceeding under Section 5 would be thrown into utter confusion, the proceeding would be one not by the Commission but under and at the direction of the court. The Commission would be continually in court to enforce such subpœnas as those demanded here, if the court were to direct that they issue, and it would never be able to complete within a reasonable time, any proceeding under Section 5. Chief Justice Taney in *Decatur* v. *Paulding,* 14 Peters 497, 515 said:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the government

> would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.

The case of *Kansas City Southern Railroad Company* v. *Interstate Commerce Commission,* 252 U. S. 178, cited and quoted from by petitioner on pages 21, 22, and 23 of its brief, is not in point in this case. That was a proceeding upon a petition for mandamus to compel the Interstate Commerce Commission to perform a duty explicitly directed by statute and which the Commission refused to perform because it said the duty commanded by the statute was "beyond the possibility of rational determination" and "incapable of rational ascertainment." The Court at page 187 said:

> It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the nonaction of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the

> Commission's unequivocal refusal to obey such command.

It was not an effort to control, direct, or reverse a decision or ruling of the Commission, but to compel it to proceed to a decision in compliance with the command of the statute.

The case of *St. Louis Southwestern Railway* v. *Interstate Commerce Commission,* 290 Fed. 264, cited by petitioner on page 23 of its brief, does not support petitioner's position. The writ was refused because the order of the Commission refusing to allow an examination of the papers was within its discretion. Nor does the decision in the same case in the Supreme Court, 264 U. S. 64, help petitioner.

Chief Justice Martin said in *Bartlesville Zinc Co.* v. *Interstate Commerce Commission,* 30 Fed. (2d) 479, 480:

> Mandamus can not be had to compel a particular exercise of judgment or discretion

In *Tidal Osage Oil Co.* v. *West,* 30 Fed. (2d) 737, 738, Justice Van Orsdel said, quoting from *Riverside Oil Co.* v. *West,* 190 U. S. 316, 324:

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

III

The Statute provides a plain, adequate, and exclusive remedy for any error the Commission may have committed in the exercise of its judgment and discretion

If the Commission erred in the exercise of its judgment and discretion and petitioner has a grievance, Section 5 provides a plain, adequate, statutory, and exclusive remedy. That fact alone is fatal to the petition. Section 5 of the Federal Trade Commission act provides:

> If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside

the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission

> be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.
>
> The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

The application of petitioner for subpœnas duces tecum and the order of the Commission denying such application are a part of the record to be certified to and reviewed by the Circuit Court of Appeals. Such court in reviewing the Commission's action has the entire record, including pleadings, motions, applications and rulings thereon, testimony, and exhibits before it.

If a respondent offers evidence which the Commission at the hearing rejects, the respondent, if the Commission issues an order against it, can take the case to the Circuit Court of Appeals, and there have such action of the Commission reviewed, and if the Commission's action were wrong, have the case sent back to the Commission with directions to receive and consider such evidence. The situation in this case is wholly similar to that, and cases have been returned to the Commission for the taking of additional testimony—upon application of the Commission and upon application of respondents. (*Federal Trade Commission* v. *Armour & Co.*, Docket 351; *Federal Trade Commission* v. *Winsted Hosiery Co.*, Docket 214.) In *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U. S. 568, 579, the Supreme Court said: "The court also is empowered to order the taking of additional testimony for its consideration."

The reason petitioner can not introduce the evidence which it desires from the documents for which it demands subpœnas duces tecum is the refusal of the Commission to issue the subpœnas duces tecum. This would certainly constitute reasonable ground for the failure to adduce such evidence, and petitioner's rights under the statute are in no way jeopardized by the failure to offer such documents and have them marked at the hearing.

The statement on page 14 of petitioner's brief that "Nowhere in such Act nor in the rules is any provision made for the calling of witnesses by the respondent," is contradicted by statements on pages 15 and 16 of its brief. There it states that "The Federal Trade Commission Act specifically gives the right to respondent to appear and show cause and give evidence in its behalf," and that the rules provide a method " whereby a respondent makes application to the Commission for the issuance of subpœnas and subpœnas duces tecum to the respondent's witnesses." The practice and procedure before the Commission make ample provision for the calling of witnesses by a respondent before it and fully protect the rights of such respondent.

In *Royal Baking Powder Company* v. *Federal Trade Commission,* 32 Fed. (2d) 966, 968, this Court said:

> But, assuming that on hearing on October the 8th the commission had granted the alleged threatened order, the company would be in no better position. It would be met by the objection that it could have reserved its exceptions to the order, and when the case was finally disposed of before the commission, if adverse to the interests of the plaintiff, it had a plain and adequate remedy at law through section 5 of the statute, which provides a remedy for the enforcement of the orders of the commission through an action brought in the proper Circuit Court of Appeals, and a remedy by which any person, partnership, or corporation, against whom an order has been issued by the commission, may bring an action in the same court to have the order set aside.
>
> It is well settled that the right of review herein afforded by the Circuit Court of Appeals constitutes a "plain, speedy, and adequate remedy at law," and is a bar to the remedy by injunction. *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160; *Coffin Bros.* v. *Bennett,* 277 U. S. 29; *McCoy* v. *Shaw,* 277 U. S. 302.

In *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed. 45, 48, the Court said:

> It is our judgment that neither the District Court nor this Court has power under the Act to interfere with the investigation and inquiry of the Commission involving the taking of testimony and finding of facts essential to the making of such an order as shall ultimately be passed upon by the Circuit Court of Appeals for enforcement, affirmance, modification, or setting aside. A hearing is granted before the Commission, and ultimate review by the Circuit Court of Appeals is provided; therefore there is no denial of due process. The Federal Trade Commission exercises administrative, not judicial, powers. The Act provides no penalties nor has the Commission power to make more than a finding of facts, which requires confirmation by this Court before any burden is cast upon the parties subjected to inquiry. Full provision for review is made, confined, of course, to the limited right of courts to review administrative or legislative acts.

To the same effect is the decision of the Supreme Court of the District of Columbia in a proceeding for a writ of mandamus in *Royal Baking Powder Company* v. *Federal Trade Commission,* decided May 17, 1929.

In a case, a proceeding to enjoin the Commission from enforcing orders requiring certain concerns to furnish monthly reports and other information under authority of Sections 6 and 9 of the Act, where the remedy was not nearly so clear and plain as in this case it was held that an injunction would not lie because the petitioner had adequate remedy under the statute, though the Commission did not urge that injunction was not the proper remedy or point out the existence of adequate remedy under the Statute. (*Federal Trade Commission* v. *Claire Furnace Company,* 274 U. S. 160.) The statute must be followed. The issuance of subpœnas duces tecum is a question for the Commission in the first instance, subject to review by the Circuit Court of Appeals as provided in the statute. The Circuit Court of Appeals jurisdiction will in no way be affected by the Commission's refusal to issue the subpœnas duces tecum, even if erroneous.

Federal Courts have repeatedly ruled on the right to have documents produced under subpœnas duces tecum without the documents in proceedings to enforce, motions to quash and applications for subpœnas duces tecum—determining the relevancy, competency and materiality of such documents. (*United States* v. *Hunter,* 15 Fed. 712; *Dancel* v. *Goodyear Shoe Machinery Co.,* 128 Fed. 753; *Miller* v. *Mutual Reserve Fund Life Assn.,* 139 Fed. 864; *United States* v. *Terminal R. Assn.,* 154 Fed. 268; *Vacuum Cleaner Co.* v. *Platt,* 196 Fed. 398; *Murray* v. *Louisiana,* 163 U. S. 101; *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221

U. S. 361; *Weeks* v. *United States,* 232 U. S. 383; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25).

It is well settled that mandamus will not lie where there is other adequate remedy. It can not be made to perform the office of an appeal or writ of error or be used as a substitute therefor. It can not be used where another statutory method has been provided for reviewing the action below or to reverse a decision of record. The existence of a specific statutory remedy will exclude mandamus. (*Bayard* v. *White,* 127 U. S. 246, 250; *Ex Parte Newman,* 81 U. S. 152, 168; *Board of Tax Appeals* v. *McCandless,* 26 Fed. (2d) 1000, 1001; *In re Huguley Manufacturing Co.,* 184 U. S. 297; *In re Key,* 189 U. S. 84; *Ewing* v. *Fowler Car Co.,* 244 U. S. 1; *Lapique* v. *Dist. Ct.* 8 Fed. (2d) 869; *Carroll Electric Co.* v. *McCarl,* 8 Fed. (2d) 910; *Cripple Creek & Colorado Springs R. R. Co.* v. *Interstate Commerce Commission,* 11 Fed. (2d) 554. Certiorari denied; *Katsch* v. *Rafferty,* 12 Fed. (2d) 450; *In re Press Printers & Publishers,* 12 Fed (2d) 660 664; *Henderson Tire & Rubber Company* v. *Reeves,* 14 Fed. (2d) 903; *Moore* v. *Greenhow,* 114 U. S. 338; *Ex parte Riddle,* 255 U. S. 450; *Norris* v. *Forbes,* 278 Fed. 331; *Kansas City Southern Railway Co.* v. *Interstate Commerce Commission,* 6 Fed. (2d) 692, 694, certiorari denied 269 U. S. 570; *Abilene & S. R. R. Co.* v. *Interstate Commerce*

Commission, 8 Fed. (2d) 901, certiorari denied 270 U. S. 650; *In re Gilbough*, 13 Fed. (2d) 462, 463; *McCabe* v. *Work*, 2 Fed. (2d) 941; *Work* v. *Rives*, 267 U. S. 175, 183; *Interstate Commerce Commission* v. *Waste Merchants Assn.*, 260 U. S. 32, 34; *Donner Steel Co.* v. *Interstate Commerce Commission*, 285 Fed. 955; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316).

In *Ex parte American Steel Barrel Company*, 230 U. S. 35, 45, the Court said:

> The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. *Ex parte Newman*, 14 Wall. 152, 165; *Bayard* v. *United States*, 127 U. S. 246; *In re Morrison*, 147 U. S. 14. * * * If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under Section 14 of the new Judicial Code, and we can not compel him through a writ of mandamus to undo what has thus been done.

In re Press Printers and Publishers, 12 Fed. (2d) 660, 664 the Court said:

> Mandamus, being an extraordinary remedial process, should never be employed where the party seeking it may obtain redress in the ordinary course of judicial proceedings in the one case by original action, and in the other by employing the means afforded by law for the correction of errors after a suit has been already instituted.

In *Symons* v. *Robertson,* 30 Fed. (2d) 566, 567, Justice Robb said:

> It is apparent that it was the Commissioner's duty and within his jurisdiction to determine primarily whether the requirements of this statute had been complied with by appellant and if the Commissioner erred in his decision, an appeal to this court was available to appellant. It is familiar law that a writ of mandamus can not take the place of an appeal.

In *Maryland* v. *Soper,* 270 U. S. 9, the Supreme Court held that mandamus is an extraordinary writ "and in civil cases does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or appeal."

The courts have consistently refused to interfere with the taking of testimony under Section 5 of the Federal Trade Commission Act. (*Nulomoline Co.* v. *Federal Trade Commission,* 254 Fed. 988; *Hurst & Son* v. *Federal Trade Commission,* 268 Fed. 874; *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed. 45; *Royal Baking Powder Co.* v. *Federal Trade Commission,* 32 Fed. (2d) 966; *Royal Baking Powder Co.* v. *Federal Trade Commission,* Supreme Court, District of Columbia, decided May 17, 1929.)

Petitioner cites no case where a writ of mandamus has been issued directing the issuance of a subpœna duces tecum. Mandamus can not be used to compel the Federal Trade Commission to issue subpœnas duces tecum. (*Vacuum Cleaner Company* v. *Platt*, 196 Fed. 398; *Tucker* v. *Peiler*, 297 Fed. 570; *Schuricht* v. *McNutt*, 26 Fed. (2d) 388; *Symons* v. *Robertson*, 30 Fed. (2d) 566; *Tidal Osage Oil Co.* v. *West*, 30 Fed. (2d) 737; *Royal Baking Powder Co.* v. *Federal Trade Commission*, 32 Fed. (2d) 966; *Work* v. *Rives*, 267 U. S. 175.)

IV

The subpœnas duces tecum prayed for by the petitioner would violate the Fourth Amendment to the Constitution of the United States

While we do not believe that this question is, strictly, before the Court in this proceeding we would like to call the Court's attention to it in order to show that the Commission's refusal to issue these subpœnas duces tecum was not arbitrary, unwarranted or capricious. Petitioner's demands are set forth on pages 8 and 9 hereof.

The description or specification of the documents desired is so indefinite and uncertain as to in no way give those upon whom such subpœnas would be served reasonable notice or knowledge of the documents required or enable them to produce the documents without uncertainty. Subpœnas duces tecum must possess such certainty. (*United States* v. *Hunter*, 15 Fed. 712; *United States* v. *Terminal Railroad Assn.*, 154 Fed. 268.)

If petitioner's application means that the parties are to be required to produce any and all copies of letters, circulars, literature, etc., used in the solicitation of subscriptions without regard to any false representations which may have been made in such letters, circulars, or literature, a subpœna duces tecum demanding such documents would be unreasonable and violative of the Fourth Amendment. (*Hale* v. *Henkel,* 201 U. S. 43; *Boyd* v. *United States,* 116 U. S. 616; *Interstate Commerce Commission* v. *Harriman,* 211 U. S. 407; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298.)

A party is not entitled under a subpœna duces tecum to have brought into court a mass of books and papers that he may search through them to gather evidence. (*Murray* v. *Louisiana,* 163 U. S. 101; *Miller* v. *Mutual Reserve Fund Life Assn.,* 139 Fed. 864; *United States* v. *Terminal R. Assn.,* 154 Fed. 268; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298.)

Unless there is a reasonable showing of the relevancy and materiality of the documents, to require their production would violate the Fourth Amendment. (*Dancel* v. *Goodyear,* 128 Fed. 753; *United States* v. *Terminal R. Assn.,* 154 Fed. 268; *Hale* v. *Henkel,* 201 U. S. 43; *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298; *Essgee Co.* v. *United States,* 262 U. S. 151; *Wilson* v. *United States,* 221 U. S. 361; *Interstate Commerce*

Commission v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25.)

In *Dancel* v. *Goodyear Shoe Machinery Co.,* 128 Fed. 753, 760, Judge Colt said:

> A party has no right, and the court has no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is unwarranted, and an infringement upon a fundamental personal right guaranteed by the federal Constitution. The courts have always recognized this protection to the individual, secured by our organic law. Such recognition is seen in the distinction which is made between a subpœna ad testificandum and a subpœna duces tecum. The former is a process of right, while the latter is addressed to the discretion of the court. Discretion here does not mean that the court has power to refuse the compulsory production of a paper which is material evidence in the case, but that, before compelling its production by a subpœna duces tecum, it will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, will decline to issue the writ.

The papers requested by the petitioner are not shown in any way nor is there anything in the record to show that they relate to the charges against petitioner made in the complaint of the Commission. It is the duty of the Commission to keep the records of proceedings before it within reasonable limits and not burden the Circuit Courts of Appeals with huge records, made up largely of irrelevant and immaterial matters. The Commission has been criticized for attempting to use its processes too extensively. In *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298, 305, the Supreme Court said:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.
>
> We do not discuss the question whether it could do it if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, and

> as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville and Nashville R. R. Co.,* 236 U. S. 318, 335. The question is a different one where the State granting the charter gives its commission power to inspect.
>
> The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formally in equity the ground must be found in admissions in the answer. Wigram, Discovery, 2d ed., paragraph 293. We assume that the rule to be applied here is more liberal, but still a ground must be laid, and the ground and the demand must be reasonable. *Essgee Co.* v. *United States,* 262 U. S. 151, 156, 157. A general subpœna in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale* v. *Henkel,* 201 U. S. 43, 77. In the state case relied on by the government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541.

The Commission certainly should not allow its processes to be used by a respondent before it on a fishing expedition to determine the methods used by the respondent's competitors. Taking the application in its narrowest scope, the subpœnas duces tecum which petitioner demands would mean about six hundred documents from each of the concerns upon which it requests that such subpœnas be served. (R. 29.)

In *Weeks* v. *United States,* 232 U. S. 383, 391, the Supreme Court said:

> The effect of the Fourth Amendment is to put the Courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Therefore, the Courts and certainly the Federal Trade Commission have no power to issue such subpœnas duces tecum as those demanded by petitioner. (*Dancel* v. *Goodyear,* 128 Fed. 753; *United States* v. *Terminal Railway Assn.,* 154 Fed. 268; *Hale* v. *Henkel,* 201 U. S. 43; *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298.)

The Commission has never refused to issue the subpœnas ad testificandum requested by petitioner. Its refusal goes only to the subpœnas duces tecum.

The Commission has issued and served the subpœnas ad testificandum requested by petitioner and has issued and served subpœnas ad testificandum on behalf of the petitioner upon those to whom petitioner requested subpœnas duces tecum.

CONCLUSION

In order for this Court to grant this writ of mandamus it must hold that the act of issuing a subpœna duces tecum by the Federal Trade Commission is purely a ministerial act, or its action in refusing to issue such subpœnas in this proceeding before it was arbitrary and unwarranted, and that petitioner has no other adequate remedy and that the subpœnas duces tecum would violate no rights of those to whom they are issued.

The order of the Supreme Court of the District of Columbia should be affirmed.

Robert E. Healy,
Chief Counsel, Federal Trade Commission,
Baldwin B. Bane,
Attorneys for Respondents.

U. S. GOVERNMENT PRINTING OFFICE: 1929